THE NORTHWEST ORDINANCE AS A CONSTITUTIONAL DOCUMENT

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> Like the declaration of independence, like the constitution that binds these states together, its language is simple and unostentatious. But how comprehensive is its spirit! How potent are its truths! The west tells its present effect, and the future shadows forth yet mightier results. Its impress is upon our character, and upon our legislation. There it must remain as long as the Saxon race inherits the soil.
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> —Jordon Pugh on the Northwest Ordinance, 1844.[1]

The spine of the first volume of the United States Code (U.S.C.) suggests that it contains only the first six titles of the laws of the United States.[2] Also included in that volume, however, are the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the Constitution.[3] Of these documents, the Northwest Ordinance is the least familiar. One commentator has speculated that "[e]very citizen of this republic who has passed through the schools of any of the states vaguely recollects, perhaps painfully, his instruction concerning this momentous document";[4] but even this modest assessment is probably optimistic. For its part, Volume One of the U.S.C. does virtually nothing to educate its users on the subject, and so most of those who notice the Ordinance there are probably unsure about why it appears where it does, right before the text of the Constitution.

On July 13, 1787, while the Federal Convention was drafting the Constitution in Philadelphia, the Continental Congress in New York[5] enacted an ordinance to govern territory that the states had ceded to the national government.[6] This document, most often referred to today as

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1. Peter S. Onuf, Statehood and Union: A History of the Northwest Ordinance 140 (1987) [hereinafter Onuf, Statehood] (quoting Jordon Pugh, Jordon Pugh Oration, *in* Celebration of the Fifty-Seventh Anniversary of the Settlement of Ohio, April 8th, 1844, at 21 (1844)).

2. See the first volume of the 1988 edition of the United States Code. The title of the document in U.S.C. Volume One is "Ordinance of 1787: The Northwest Territorial Government." This Note, however, generally refers to the document as the "Northwest Ordinance." See infra note 7 and accompanying text.

3. See the first volume of the 1988 edition of the United States Code at xxxviii–xviii. The Northwest Ordinance also appears at U.S.C.A. preceding Const. art. 1 (West 1987), and in Onuf, Statehood, supra note 1, at 60–64.

4. Clarence E. Carter, Colonialism in Continental United States, 47 S. Atlantic Q. 17, 18 (1948).

5. See Jack E. Eblen, Origins of the United States Colonial System: The Ordinance of 1787, 51 Wis. Mag. Hist. 294, 294 (1968).

6. See The Northwest Ordinance. For the receipt of the territorial cessions by the Continental Congress, see 26 Journals of the Continental Congress 1774–1789, at 112–17

the Northwest Ordinance,[7] set the pattern for territorial governance and statemaking that was ultimately applied to thirty-one of the fifty states.[8] Since its passage, the Ordinance has received much praise.[9] Most of the enthusiasm has focused either on the provision promising the communities in the territory statehood on an equal footing with the original thirteen states,[10] or on the provision in the "articles of compact" section[11] prohibiting slavery.[12] Other material in the "articles of compact" section has received favorable attention as well, such as the provisions promoting

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(Gaillard Hunt ed., 1903–1919) [hereinafter Journals]. Today the area that was governed by the Northwest Ordinance is occupied by the States of Ohio, Indiana, Illinois, Wisconsin, Michigan, and part of the State of Minnesota.

7. It is also often referred to, especially in material from the nineteenth century, as the "Ordinance of 1787." See, e.g., B.A. Hinsdale, The Old Northwest 276–77 (New York, Townsend MacCoun 1888) (suggesting that a mark of the Ordinance's significance is that "[i]t alone is known by the date of its enactment, and not by its subject-matter"). The title on the Ordinance as passed is "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio."

8. See James A. Curry et al., Constitutional Government: The American Experience 61 (1989); see also Carter, supra note 4, at 22 (noting that the pattern applied to the Northwest Territory also applied largely to the Southwest Territory and to the territories of Mississippi, Orleans, Louisiana-Missouri, Alabama, Arkansas, and Florida); Eblen, supra note 5, at 294 ("[I]ts provisions were to lay the foundation for the governments of the thirty-one public lands states and Hawaii."). For the Southwest Ordinance and other legislative progeny of the Northwest Ordinance, see Frederick E. Hosen, Unfolding Westward in Treaty and Law: Land Documents in United States History from the Appalachians to the Pacific, 1783–1934, at 45 (Southwest Ordinance), 59–60 (Mississippi Territorial Act), 84–89 (Missouri Territorial Act), 188–97 (Oregon Territorial Act), 197–203 (Minnesota Territorial Act) (1988).

9. Eminent nineteenth-century jurist and treatise writer Timothy Walker probably articulated the extreme of enthusiasm for the Ordinance: " 'It approaches . . . as nearly to absolute perfection as anything to be found in the legislation of mankind . . . . ' " See Theodore C. Pease, The Ordinance of 1787, 25 Miss. Valley Hist. Rev. 167, 172 (1938–1939) (quoting Walker). Daniel Webster was only slightly more circumspect: "[W]e are accustomed, sir, to praise the lawgivers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character, than the ordinance of '87 . . . ." 6 Cong. Deb. 39 (1830). More recently, historian John P. Bloom has described the Ordinance as "a symbolic plowshare for our people to follow across the land, to erect a continental nation of fifty states on the foundation of the original thirteen." John P. Bloom, The Continental Nation—Our Trinity of Revolutionary Testaments, 6 W. Hist. Q. 5, 7 (1975).

The praise of the Ordinance has not been unmixed. For a representative selection of disparaging comments, see id. at 8–11.

10. See Bloom, supra note 9, at 13 (quoting Milo M. Quaife to this effect).

11. B.A. Hinsdale refers to the articles of compact as the "six bright jewels in the crown that the Northwest Territory was ever to wear." Hinsdale, supra note 7, at 271. They also have been considered as a model for the Bill of Rights. See Curry, supra note 8, at 61; Bloom, supra note 9, at 11.

12. Hinsdale refers to this provision as one of the "greatest precedents of our history." Hinsdale, supra note 7, at 277.

education, ensuring religious liberty, and encouraging good relations with Native Americans.[13]

Historians of the West and Midwest have long recognized and exploited the rich potential of the Ordinance as a subject of scholarship.[14] In legal academia, however, the Ordinance has largely remained an untapped resource. Those legal scholars who have addressed it have generally done so only to refer in passing to particular provisions.[15] As a major national document, highly influential in the history of the polity, however, the Ordinance warrants more serious attention from those concerned with the place of law in our political culture.[16]

Many commentators have suggested that the Ordinance is in some sense constitutional,[17] but none has explored this idea in depth. This

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13. For a collection of quotations praising some of these provisions, see Frederick D. Stone, The Ordinance of 1787, 13 Pa. Mag. Hist. & Biography 309, 334–35 (1889).

14. See The Northwest Ordinance 1787: A Bicentennial Handbook 127–31 (Robert M. Taylor, Jr. ed., 1987) (bibliography); The Northwest Ordinance: Essays on Its Formulation, Provisions, and Legacy 129–38 (Frederick D. Williams ed., 1989) (bibliography); Leonard Rapport, Discussion of Sources, *in* The American Territorial System 56, 56–61 (John P. Bloom ed., 1973).

15. For the most recent examples, see Frederick J. Blue, From Right to Left: The Political Conversion of Salmon P. Chase, 21 N. Ky. L. Rev. 1, 10–11, 15 (1993) (slavery clause); John P. Lowndes, When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title, 42 Buff. L. Rev. 77, 93 n.126, 95 n.138, 113 (1994) (provision on Native Americans); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1457–61 (1990) (free exercise provision); William E. Sparkman, The Legal Foundations of Public School Finance, 35 B.C. L. Rev. 569, 572 (1994) (education provision); Barton H. Thompson, Jr., The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause, 44 Stan. L. Rev. 1373, 1382 n.38 (1992) (contract clause). Some legal scholars have recently referred to other notable provisions in the Ordinance. See William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 781, 791, 831–34 (1995) (takings provision); Jackson Williams, The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment, 18 S. Ill. U. L.J. 563, 570 n.55 (1994) (legislative apportionment provision); Ann M. Byrne, Comment, Peremptorily Deciding State Constitutional Law Issues in Michigan: Cruel or Unusual Decision Making?, 11 Thomas M. Cooley L. Rev. 213, 234 n.158 (1994) (cruel and unusual punishment provision).

16. The evolution of the Ordinance from earlier proposals regarding government of the territories could provide a useful basis for comparison to the evolution of the Constitution. See Robert F. Berkhofer, Jr., The Northwest Ordinance and the Principle of Territorial Evolution, *in* The American Territorial System, supra note 14, at 45, passim [hereinafter Berkhofer, Territorial Evolution]. Examination of how subsequent territorial legislation differed from the pattern set by the Ordinance could reveal changing ideas about the appropriate scope of the national government, and, as states were created from these territories, about federalism as well. See Curry, supra note 8, at 61. Analysis of the treatment of the articles of compact in the courts could provide a more comprehensive understanding of nineteenth-century conceptions of federally protected rights. See Scott v. Sandford, 60 U.S. (19 How.) 393, 432–52 (1856); Strader v. Graham, 51 U.S. (10 How.) 82, 96–98 (1850).

17. See Wager Swayne, The Ordinance of 1787 and the War of 1861, at 64 (New York, C.G. Burgoyne 1892) (reproducing George F. Hoar's speech in honor of the centennial of Marietta, Ohio: "The Ordinance belongs with the Declaration of Independence and the

apparent reluctance may result from the fact that the sense in which the Ordinance could be constitutional is unclear. It is certainly not currently a *constitution*:[18] it is not the supreme law of the land; it does not establish the institutions, structure, and powers of our government; it is no longer enforceable in court.[19] One sense of the term "constitution," however, refers to the set of principles according to which a political community governs itself.[20] Scholars have observed that the Constitution itself contains relatively little material of this kind.[21] As a result, some texts like the

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Constitution. It is one of the three title-deeds of American constitutional liberty."); Robert F. Berkhofer, Jr., The Republican Origins of the American Territorial System, *in* The West of the American People 152, 152 (Allan G. Bogue et al. eds., 1970) [hereinafter Berkhofer, Republican Origins] ("[T]he Constitution . . . federalized the government of the new nation, and the Northwest Ordinance . . . provided for the expansion of that nation upon new principles."); Roy F. Nichols, The Territories: Seedbeds of Democracy, 35 Neb. Hist. 159, 161 (1954) (noting that the Ordinance was "a plan which in many ways was of equal importance with the Constitution, likewise in the process of creation."); Peter S. Onuf, The Northwest Ordinance, *in* Roots of the Republic: American Founding Documents Interpreted 249, 250 (Stephen L. Schechter ed., 1990) [hereinafter Onuf, Roots] ("From a functional perspective, the [Ordinance and the Constitution] are *complementary*; the Ordinance defines and limits Congress's constitutional powers over the national domain."); see also infra Part II.

18. "The Ordinance was never intended to be a 'constitution,' properly speaking; yet neither was it supposed to be merely statutory legislation." Onuf, Roots, supra note 17, at 250. Onuf goes on to state that "the modern idea of 'constitution' is inappropriate to the Northwest Ordinance," because the Ordinance emphasized land rights. Id. at 251. He proposes instead that the colonial charter is the proper model for the Ordinance. See id. As Donald S. Lutz has shown, the colonial charter is prominent among the numerous types of political documents that contributed to the modern notion of constitutionalism. See Donald S. Lutz, The Origins of American Constitutionalism 35–49 (1988). But, regarding the genre of the Ordinance, see infra note 20.

19. See infra note 77.

20. See Lutz, supra note 18, at 10, 13. Among the many types of documents that Lutz describes as having contributed to the various senses of "constitution," the one most similar to the conception used in this Note is the genre of "fundamentals." See id. at 19.

Arthur Bestor defines a constitution as "nothing other than the aggregate of laws, traditions, and understandings . . . by which a nation brings to political and legal decision the substantive conflicts engendered by changes in all the varied aspects of its societal life." Arthur Bestor, The American Civil War as a Constitutional Crisis, 69 Am. Hist. Rev. 327, 328 (1964) [hereinafter Bestor, Civil War]. Robert F. Berkhofer, Jr., states that the "*novus ordo saeclorum*" of the Great Seal denominated the new order of enlightened ideals, "religious freedom, economic opportunity, relative social equality, and . . . republican government," and that the Ordinance was "an attempt to do for colonial relations what had been done otherwise to bring forth a new nation upon new principles." Berkhofer, Territorial Evolution, supra note 16, at 45.

21. See, e.g., Sheldon D. Pollack, Constitutional Interpretation as Political Choice, 48 U. Pitt. L. Rev. 989, 1017–19 (1987). The scarcity of explicitly expressed principles in the Constitution is perhaps most apparent when the document is compared with constitutions of other nations. See Curry, supra note 8, at 7.

Declaration of Independence[22] and The Federalist Papers[23] are given quasi-constitutional status because they authoritatively express guiding principles.

Not every document expressing political principles, however, can meaningfully be called a constitutional document. The Declaration and The Federalist are considered constitutional because of the effects they are understood to have had at the time of their production, and because of the influence they have had upon the subsequent political life of the nation. If The Federalist had been written in 1960 and all the other facts of U.S. history had been the same, no one would consider it a constitutional document. In order to be constitutional, a document must have creative or foundational effects upon a political entity.

In addition, a constitutional document must reflect ideas or principles that can guide political practice. If the Declaration of Independence had simply stated, "By this document the colonies of America are declared to be free and independent states, and all political connection between them and the state of Great Britain is totally dissolved," we might consider it to have had the foundational or creative effect of severing America's ties with Britain, but we would probably not consider it to be a constitutional document. Because this hypothetical Declaration is nearly devoid of political principles, it could not meaningfully influence political practice, and as such it could not be seen as constitutional—that is, it could not meaningfully contribute to the substance of a political entity.

The Federalist Papers and the Declaration of Independence are examples of the concept of the "constitutional document" used in this Note. Constitutional documents are authoritative foundational texts to which we look for guidance in trying to understand our national political and legal traditions. A constitutional document exhibits two key characteristics: (1) it has authority of an extraordinary, foundational character; and (2) it expresses principles that guide the actions of a political entity.

This Note argues that the Northwest Ordinance is a constitutional document because it authoritatively expresses a set of principles that have guided national political action.[24] Part I describes the history of the pas-

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22. See, e.g., Walter Berns, Taking the Constitution Seriously 11, 16–20 (1987); Curry, supra note 8, at 53; Boris I. Bittker, The Bicentennial of the Jurisprudence of Original Intent: The Recent Past, 77 Cal. L. Rev. 235, 256 n.68 (1989); Harry V. Jaffa, What Were the "Original Intentions" of the Framers of the Constitution of the United States?, 10 U. Puget Sound L. Rev. 351, 363–64 (1987). But see Harold Hyman, quoting Jack Rakove's criticism of those who attempt " 'to locate the Northwest Ordinance within some larger context of Revolutionary enactments.' " Harold M. Hyman, American Singularity: The 1787 Northwest Ordinance, the 1862 Homestead and Morrill Acts, and the 1944 G.I. Bill 29 (1986) (quoting Jack Rakove, Ironies of Empire: Hope, Desperation, and the Making of the Northwest Ordinance, Paper Delivered at Claremont Institute Conference (Feb. 1985)).

23. See infra notes 94–96 and acccompanying text.

24. Onuf captures almost exactly the idea aimed at here regarding the constitutional character of the Ordinance when he states that "the text of the Ordinance may not have

sage of the Ordinance and its provisions. Part II argues that the Ordinance has the foundational authority of a constitutional document. Considering the Ordinance to have this kind of authority means that judicial and scholarly analysis of our constitutional tradition must take the Ordinance into account. Part III describes the principles that the Ordinance has established and briefly sketches how each has guided national political action. Part IV suggests that the principles in the Ordinance may have modern implications for national governments, and looks to government social programs, international trade, and foreign constitution making as contexts in which those principles may be relevant. This Note concludes that understanding the Northwest Ordinance as a part of our tradition of constitutional documents may provide useful new perspectives on our constitutional history, by making the more expansive vision of national government that the Ordinance embodies available for analysis.

I. HISTORY OF THE NORTHWEST ORDINANCE

At the end of the War for Independence, the Continental Congress faced a variety of political and economic problems relating to the Northwest Territory. After an ineffectual attempt to address these matters with the Ordinance of 1784,[25] the Congress produced the Northwest Ordinance three years later in response to essentially the same concerns. This Part examines the conditions that influenced the development and drafting of the Northwest Ordinance.

Several issues confronting the Continental Congress in the early 1780s led to the passage of the Northwest Ordinance. First, the national government was in need of income.[26] Resources had been depleted and

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been constitutional, but the principles it implemented *were* fundamental, and Congress's commitment to those principles constituted the United States as an expanding union of equal states." Onuf, Roots, supra note 17, at 257. However, his conception of the principles is limited, and the statement itself appears in the context of an impressionistic discussion (appropriate for a "Commentary" on the Ordinance), rather than a full-scale argument. See Hyman, supra note 22, at 29, for a short list of laws and decisions influenced by the Ordinance through the twentieth century.

To what extent the Ordinance was *intended* to establish principles to guide national action is a difficult empirical question, but Onuf's claim, quoted supra note 18, seems on target, and bears repeating: "The Ordinance was never intended to be a 'constitution,' properly speaking; yet neither was it supposed to be merely statutory legislation." Onuf, Roots, supra note 17, at 250. It seems likely that the creators of the Ordinance intended something more for it than the temporary solution of the problems of the Northwest Territory, but how much more is impossible to say. For the purposes of this Note, however, the question is of limited significance, since the argument for the authority of the Ordinance generally does not rely upon claims about the intentions of its creators. See infra Part II.

25. The Ordinance of 1784 (U.S. 1784), reprinted in Onuf, Statehood, supra note 1, at 46–49.

26. See The Federalist No. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961) (discussing role of territory in discharging debt); Merrill Jensen, The Creation of the

debts incurred in the course of the war, and the Articles of Confederation provided Congress with little power to raise revenue.[27] Second, the departure of the Crown had left a power vacuum at the top of the political hierarchy, and the end of the war left the states without a unifying cause.[28] Both of these circumstances encouraged conflict among the states.[29] Third, the territories themselves posed threats to security. The Continental Congress feared that uncontrolled settlement of the West would provoke resistance from Native American communities in the region, drawing the nation back into war.[30] Furthermore, leaving the western lands outside the control of the central government could invite Britain and Spain[31]—both hovering on the borders—or even France[32] to try to acquire the regions for themselves. This, too, could lead to war, and potentially to the loss of the country's recently won independence.[33]

The Continental Congress first attempted to address these problems through the Ordinance of 1784, drafted by Thomas Jefferson.[34] The Ordinance of 1784 established ten states in the region, which were to be governed according to a three-stage schema.[35] In the first stage of government, the inhabitants of each state would govern themselves under the constitution and laws of one of the existing states, subject to altera-

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National Domain, 1781–1784, 26 Miss. Valley Hist. Rev. 323, 338 (1939–1940); Henry Tatter, State and Federal Land Policy During the Confederation Period, *in* The West of the American People, supra note 17, at 189, 192 (leaders cast aside liberal concepts of right to land in the West and made it "a basis for a fund to extinguish nation's debts . . . .").

27. See Jensen, supra note 26, at 338.

28. See id.

29. See Onuf, Statehood, supra note 1, at 55.

30. See The Federalist No. 38, at 234 (James Madison) (Clinton Rossiter ed., 1961) (impugning Maryland's refusal to ratify the Articles of Confederation "although the enemy remained the whole period at our gates, or rather in the very bowels of our country"); Jensen, supra note 26, at 339.

31. See Beverley W. Bond, Jr., An American Experiment in Colonial Government, 15 Miss. Valley Hist. Rev. 221, 221 (1928–1929); Pease, supra note 9, at 176.

32. See Pease, supra note 9, at 174 (citing support for a perceived threat from France, but claiming that it was not a serious concern).

33. See Carter, supra note 4, at 19.

34. But see Robert F. Berkhofer, Jr., Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System, 29 Wm. & Mary Q. 231, 231 (1972) [hereinafter Berkhofer, Jefferson and the Ordinance of 1784] (arguing that Jefferson's role in the Ordinance of 1784 has been overstated). Historians have generally considered Benjamin Franklin's Albany Plan of Union, which contained provisions regarding western colonies, as the earliest precursor of the Ordinance. See Hinsdale, supra note 7, at 264. But see George H. Alden, The Evolution of the American System of Forming and Admitting New States into the Union, 18 Annals Am. Acad. Pol. & Soc. Sci. 469, 472 (photo. reprint 1968) (1901) (claiming that proposal by Silas Deane in 1776 was first plan for formation of new states). For accounts of the various efforts at territorial governance leading up to the Ordinance, see Hinsdale, supra note 7, at 263–68; Arthur Bestor, Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754–1784, *in* The American Territorial System, supra note 14, at 13, passim [hereinafter Bestor, Consensus].

35. See The Ordinance of 1784, reprinted in Onuf, Statehood, supra note 1, at 46–49.

tion by their own legislatures.[36] They would also be allowed to send a delegate to Congress who would have the right to debate but not to vote.[37] Upon reaching a population of 20,000 free inhabitants, each state would enter the second stage, in which it would be permitted to establish its own permanent constitution subject to restrictions subordinating the state to the national government.[38] The third stage was full statehood; when a territorial state reached a population equal to that of the smallest of the original states, it would be admitted to Congress "on an equal footing with the said original states,"[39] provided Congress had consented to its admission.[40]

Soon after it passed, the Continental Congress realized that the Ordinance of 1784 was inadequate in several respects. First, it promised the settlers substantial autonomy during the first stage of government.[41] George Washington had argued in the early 1780s that the inherent unruliness of the frontier settlers required that Congress use a strong hand in the territories,[42] and arguments of this kind gained force after 1786, when Shays's Rebellion raised the specters of anarchy and counterrevolution.[43] Another problem with the Ordinance of 1784 was that it immediately divided the Northwest Territory into ten states. A sudden influx of ten semi-independent political entities promised to exacerbate existing interstate conflict by introducing new communities with their own agendas to pursue.[44] Finally, as James Monroe argued after visiting the Territory, the state boundaries Jefferson had drawn were not well adapted to actual geographical conditions in the region.[45] Because of these problems, the Ordinance of 1784 was never implemented.[46]

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36. See id.

37. See id. at 49.

38. See id. at 47. States were also required to establish republican forms of government and were essentially prohibited from taxing the lands of nonresident proprietors at a higher rate than that applied to the lands of residents. See id.

39. Id.

40. See id. at 47–49.

41. See id. at 47.

42. See Letter from George Washington to James Duane (Sept. 7, 1783), *in* 27 The Writings of George Washington 133, 135–36 (John C. Fitzpatrick ed., 1938); Jensen, supra note 26, at 339; Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 237.

43. See Andrew R.L. Cayton, The Northwest Ordinance from the Perspective of the Frontier, *in* The Northwest Ordinance 1787: A Bicentennial Handbook, supra note 14, at 1, 1–3; Gordon T. Stewart, The Northwest Ordinance and the Balance of Power in North America, *in* The Northwest Ordinance: Essays on Its Formulation, Provisions, and Legacy, supra note 14, at 21, 23, 28. Eblen, however, claims that Shays's Rebellion was not influential. See Eblen, supra note 5, at 307.

44. See Onuf, Statehood, supra note 1, at 45, 56; Alden, supra note 34, at 477; see also Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 243 (noting that division of territory into states from outset was one of Jefferson's bold strokes in drafting Ordinance of 1784).

45. See C.B. Galbreath, The Ordinance of 1787, Its Origin and Authorship, 33 Ohio Archaeological & Hist. Q. 111, 123 (1924).

46. See Ray A. Billington, Westward Expansion 216 (3d ed. 1967).

By the time it became apparent that a new ordinance would be needed, Jefferson had left the country,[47] and so the job of drafting a new territorial government fell to others.[48] In its final stage, a committee chaired by Massachusetts delegate Nathan Dane took charge of the matter.[49] Three drafts produced by this committee were read before Congress.[50] Congress passed the last of these drafts by a unanimous vote of the states present, thereby enacting the law that later became known as the Northwest Ordinance.[51]

As it emerged, the Northwest Ordinance responded not only to the problems that had initially motivated the Continental Congress to attempt to govern the territories, but also to the specific defects of the Ordinance of 1784.[52] By 1787, Congress's need for funds had become

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47. The first proposed amendment to the Ordinance of 1784 was brought forward on March 16, 1785. See John M. Merriam, The Legislative History of the Ordinance of 1787, 5 Proc. Am. Antiquarian Soc'y 303, 314 (1889). Jefferson had left for England and France during the summer of 1784. See Merrill D. Peterson, Thomas Jefferson and the New Nation: A Biography 295 (1970).

48. For a step-by-step account of the legislative history of the Ordinance, see Merriam, supra note 47, at 314–20.

49. In the late nineteenth century, there was a lively debate regarding who deserved credit for the Ordinance. Rufus King wrote at the time that "[t]he subject seems to have fallen under that morbid infirmity which delights in denying Homer and Shakespeare their works, and sometimes have not spared even Holy Writ from its rage." Galbreath, supra note 45, at 112 (quoting Rufus King, Ohio, First Fruits of the Ordinance of 1787 (Boston, Houghton, Mifflin 1888)). For entries in the debate, see William F. Poole, Dr. Cutler and the Ordinance of 1787, 122 N. Am. Rev. 229 (1876) (crediting Manasseh Cutler); Stone, supra note 13, at 309, 336 (denying credit to Cutler, and claiming that Dane was "the intelligent compiler"). The debate has continued among modern scholars. See Eblen, supra note 5, at 295, 311–12, 312 n.34 (crediting Jefferson, Monroe, and Dane, but denying credit to Cutler); Galbreath, supra note 45, at 169 (essentially following Stone: "Truly it may be said in conclusion that in the sense in which Thomas Jefferson was the author of the Declaration of Independence, in that sense Nathan Dane was the author of the Ordinance of 1787.").

50. See 32 Journals, supra note 6, at 313–20, 333–43.

51. See id. at 334–43. See Onuf, Statehood, supra note 1, at 58. The slavery provision—potentially the most controversial, especially given that a weaker antislavery prohibition had been rejected in Jefferson's Ordinance—was introduced by Dane at the last minute and provoked virtually no opposition, much to his surprise. See Letter from Nathan Dane to Rufus King (July 16, 1787), *in* 8 Letters, infra note 63, at 622, 623; Paul Finkelman, Slavery and Bondage in the "Empire of Liberty," *in* The Northwest Ordinance: Essays on Its Formulation, Provisions, and Legacy, supra note 14, at 61, 67; J. David Griffin, Historians and the Sixth Article of the Ordinance of 1787, 78 Ohio Hist. 252, 252–53 (1969). On the opposition to the provision after it was adopted, see Daniel Owen, Circumvention of Article VI of the Ordinance of 1787, 36 Ind. Mag. Hist. 110, 111–15 (1940).

52. Berkhofer claims that Jefferson saw the Ordinance of 1784 as merely a general framework for territorial governance, rather than as a full-scale governmental system. See Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 260. For a comparison of the provisions of the Ordinance of 1784 and the Northwest Ordinance, see Alden, supra note 34, at 475–79; Bestor, Consensus, supra note 34, at 24; David P. Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791, 61 U. Chi. L. Rev. 775, 843 (1994); Eblen, supra note 5, at 310–11; Merriam, supra note 47, at 324.

more pressing.[53] As a result, Manasseh Cutler commanded attention when he appeared in New York in early July 1787 to purchase from Congress a large tract of land on behalf of the Ohio Company,[54] and the new Ordinance reflected an increased sensitivity to the concerns of would-be settlers and investors.[55] Perhaps most conspicuous in this regard was the long paragraph near the beginning of the Ordinance laying out rules of inheritance for the territory.[56] Before Easterners would buy land or settle in the area, they had to feel that their investments would be secure over the long term.[57] Other specific provisions, such as those ensuring the sanctity of contracts[58] and prohibiting higher taxation of nonresident proprietors,[59] were also calculated to soothe the fears of wary investors.[60] Finally, the Ordinance lured settlers and investors by painting an idealized picture of frontier society in the articles of compact section. The Northwest Territory, as contemplated by the Ordinance, would be a land in which slavery was prohibited, religious pluralism was tolerated, education was promoted, and Native Americans were either befriended or battled in congressionally-backed wars, as circumstances required.[61] What more could those in New England—the target market for the sale of Western land[62]—desire? By making the Northwest Territory

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The differences between the two ordinances should not be overstated; major provisions, such as a three-stage scheme of government and the guarantee of equal statehood, were common to both documents. See Berkhofer, Republican Origins, supra note 17, at 153–60.

53. See Onuf, Statehood, supra note 1, at 44–45.

54. See Onuf, Roots, supra note 17, at 249 (citing need to spur settlement to which Ordinance responded). Many commentators have claimed that Cutler's appearance served as a catalyst to passage. See, e.g., Eblen, supra note 5, at 313 n.37; Pease, supra note 9, at 167.

55. Eblen claims, however, that the Continental Congress did not think settlement would be significant. See Eblen, supra note 5, at 314.

56. The Northwest Ordinance § 1.

57. See Onuf, Statehood, supra note 1, at 45; Poole, supra note 49, at 252.

58. The Northwest Ordinance art. 2.

59. Id. art. 4.

60. See Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 251 (describing the predecessor nonresident proprietor provision as an "attempt to benefit absentee owners and speculators. . . ."); Cayton, supra note 43, at 21 (describing the role of compact article 2, which contained the contract clause, in protecting property "in ways that mattered far more to eastern speculators (like members of the Ohio Company of Associates) than frontier residents").

61. See Onuf, Statehood, supra note 1, at xx–xxi, 45; Poole, supra note 49, at 229–32, 252–53, 260. Eblen claims that these provisions were included for the benefit of foreign inhabitants of the territory, rather than to lure American settlers. See Eblen, supra note 5, at 312–13. Some of these provisions may have resulted directly from Cutler's influence. See Galbreath, supra note 45, at 153 (quoting claim by Poole in an address that Cutler brought the Ordinance with him to New York from Massachusetts); Merriam, supra note 47, at 341 (speculating that Cutler and Rufus Putnam deserve credit for religion, education, and slavery provisions).

62. See Onuf, Statehood, supra note 1, at 58.

into an attractive product, the Ordinance sought to help sell western lands, thereby reducing the national debt.

The Ordinance responded to other western policy concerns as well. Fears of contagious disorder on the frontier were calmed by the institution of what Richard Henry Lee described to Washington as a more "strong toned" governmental system.[63] Like the Ordinance of 1784, the Northwest Ordinance contained a three-stage governmental scheme, ending in full statehood.[64] Jefferson's Ordinance, however, permitted settlers to essentially govern themselves in the first stage,[65] while the Northwest Ordinance provided that the territory was to be controlled mainly by a congressionally appointed governor in the first stage; settlers were to have no role.[66] The second "colonial" stage added a general assembly once the population in a region exceeded 5,000 free adult males, though the governor would still have significant power.[67] A region would enter the final stage—that of full statehood—once it reached a population of 60,000 free adult males.[68] This provision may have given some solace to those troubled by the relatively authoritarian character of the first two stages, in that it provided a definite figure for determining when a region would become a state. Jefferson's Ordinance, in contrast, made statehood dependent on a shifting, uncertain standard by conditioning it upon the attainment of the population level of the smallest of the original states.[69]

The governmental provisions also helped solve the problem of internal instability.[70] By providing for substantial congressional involvement in territorial affairs from the very beginning, the Ordinance gave the original states a new national project in which to cooperate—the government of the territories.[71] Furthermore, instead of Jefferson's ten states, the Ordinance gave Congress the option of managing the territory as either one or two districts in the first stage of government.[72] Two districts were less likely to proliferate conflict than ten, especially given that these districts would be governed wholly by congressional appointees, with no participation by the inhabitants. The Ordinance also limited the number of states to be created from the districts to five.[73] This smaller number was

63. Letter from Richard Henry Lee to George Washington (July 15, 1787), *in* 8 Letters of Members of the Continental Congress 620, 620 (Edmund C. Burnett ed., 1936) [hereinafter Letters]. The letter was written two days after the Ordinance was passed. See Stone, supra note 13, at 335.

64. See Onuf, Statehood, supra note 1, at 46–47.

65. See id. at 47.

66. See The Northwest Ordinance §§ 3–7.

67. See id. §§ 8–11.

68. See id. art. 5.

69. See Onuf, Statehood, supra note 1, at 47–49.

70. See supra text accompanying notes 28–29.

71. See Hinsdale, supra note 7, at 264.

72. Berkhofer suggests that Washington may have been the source of this provision. See Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 237.

73. See The Northwest Ordinance art. 5.

again preferable for being less threatening to the status quo, as was, perhaps, the fact that the document did not speak in terms of "states" except when referring to their establishment "on an equal footing" with the existing states[74]—something that was presumed to be far enough in the future to give rise to no immediate concerns.[75]

The ease with which the Ordinance was finally passed has prompted one scholar to refer to it as "a rather ordinary piece of noncontroversial legislation."[76] While the general lack of controversy in the final stage of its evolution cannot be denied, the Ordinance was in no sense ordinary. Even narrowly conceived, it was the product of four years of effort by some of the most prominent political minds of the day, directed at resolving a question of major national importance—that of how to manage the national domain. Furthermore, as the next two parts of this Note argue, the Ordinance proved over time to have constitutional significance.

II. The Authority of the Northwest Ordinance as a Constitutional Document

Though the Ordinance is not a constitution, and though its formal legal authority has long since been extinguished,[77] it nonetheless pos-

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74. See Onuf, Statehood, supra note 1, at 45, 47, 55.

75. See Eblen, supra note 5, at 314.

76. Id.

77. A detailed account of the authority of the specific provisions of the Ordinance is beyond the scope of this Note. Because the subject has been treated at length elsewhere, however, the basic history can be briefly summarized.

Less than two years after its passage, James Madison prominently denied that the Articles of Confederation had supplied the Continental Congress with the power to pass the Ordinance. See The Federalist No. 38, at 239; No. 43, at 273–74 (James Madison) (Clinton Rossiter ed., 1961). Subsequent commentators have agreed. See, e.g., P. Emory Aldrich, Remarks of P. Emory Aldrich on the Ordinance of 1787, 5 Proc. Am. Antiquarian Soc'y 343 (1888); Bestor, Consensus, supra note 34, at 17; Currie, supra note 52, at 842; Eblen, supra note 5, at 299.

When Congress convened under the Constitution, one of its first acts was to "reenact" the Northwest Ordinance, subject to minor technical revisions, under the authority of Article IV, § 3 of the Constitution. See Onuf, Statehood, supra note 1, at xviii; Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The legitimacy of this enactment as territorial legislation has not been questioned. See Aldrich, supra, at 345; cf. Currie, supra note 52, at 845 (claiming that Congress considered the Ordinance to have had authority of its own). The governmental provisions of the Ordinance were finally superseded by the Wisconsin Organic Act in 1836; after this point, no territory was subjected to the autocratic first stage of government. See Bloom, supra note 9, at 12. But see Onuf, Roots, supra note 17, at 256–57 (suggesting that the articles of compact were theoretically valid regardless of federal efforts to the contrary). For the text of the Wisconsin Organic Act, see Hosen, supra note 8, at 139–45.

In the mid-nineteenth century, antislavery advocates argued that the slavery prohibition in the articles of compact had constitutional status and that therefore fugitive slaves became free upon reaching the free states, regardless of state law. This claim was rejected by the United States Supreme Court in *Strader v. Graham*, which held that the Ordinance was superseded by the Constitution. 51 U.S. (10 How.) 82, 94–96 (1850); see also Scott v. Sandford, 60 U.S. (19 How.) 393, 435–42 (1856) (discussing the nullification

sesses authority of a sufficiently foundational character to justify considering it to be a constitutional document. Judges and scholars analyzing the American constitutional tradition should, when relevant, include the Ordinance in their analyses.

While theories of constitutional authority are numerous, no one theory captures all the features of the Ordinance that indicate its constitutional nature.[78] Thus, this Part relies on a number of different conceptions of constitutional authority to argue that the Ordinance is constitutional by virtue of several of its characteristics: its function of reproducing political entities, its enactment under what Bruce Ackerman has described as "constitutional conditions," its implicit theory of political legitimacy as being dependent on the maturity of a community, its historical legacy of expansionism, and its uniqueness and influence as a source of political principles. While perhaps none of these characteristics would, in itself, justify considering the Ordinance to be a constitutional document, taken together they establish the constitutional authority of the Ordinance.

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of the Ordinance by the adoption of the Constitution). *Dred Scott* effectively settled the question of the specific authority of the provisions of the Ordinance in the negative. See id.

For a general discussion of the authority of the Ordinance under the terms of the Articles of Confederation and the Constitution, see Currie, supra note 52, at 844–47.

78. Many scholars have considered, albeit casually, the notion that the Ordinance is somehow constitutional. See supra notes 17–23 and accompanying text. Commentators have taken a wide range of views on this issue. Jack E. Eblen makes perhaps the strongest substantive statement in favor of considering the Ordinance as a constitutional document, claiming that it "led to the imposition of a uniform system of politics throughout the American empire," and that the Ordinance and the Constitution were the "co-ordinate parts of a system for a federal republican empire that was to shape the course of United States history." Eblen, supra note 5, at 294. While Eblen does not explicitly contend that the Ordinance is constitutional, these assertions nonetheless constitute persuasive reasons for considering it to be a "constitutional document" as that term is used in this Note. Unfortunately, Eblen fails to develop these claims.

Onuf provides a good account of the opposite position, that the Ordinance is not a constitutional document:

> [I]n the American system, the national Constitution clearly was paramount. The test of the Constitution also provided the authoritative standard of constitutionality. The Northwest Ordinance simply did not measure up; its authors did not act under any specified constitutional mandate, nor was their work in turn sanctioned by the sovereign people. Hastily written and poorly organized, the Ordinance did not compare favorably with the skillfully constructed national Constitution.

Onuf, Roots, supra note 17, at 250. As Onuf goes on to suggest, however, the constitutional nature of the Ordinance does not reside in its particular provisions. See id. at 250, 257–58. Similarly, Eblen's view of the Ordinance and the Constitution as complementary instruments defining the American political entity in the course of history does not focus on the legal validity of its provisions; rather, it suggests that the authority of the Ordinance can be found partly in the events of the late eighteenth century and partly in what has happened since then. This Part establishes the foundations of that authority and argues that it is of a constitutional character.

A. *Function: Reproduction*

The first characteristic of the Ordinance that contributes to its constitutional authority is its function. Through the Ordinance, the states attempted to reproduce—to create new political entities like themselves. The concept of reproduction also applies to the Ordinance in a richer sense; where reproduction in nature functions to preserve and protect distinctive genetic material, the political reproduction provided for in the Ordinance was designed to preserve and perpetuate the distinctive political life that the states had won in the War for Independence.[79] The Ordinance worked to preserve the newly created national political identity by responding to several immediate threats to the security of the nation,[80] and it functioned to perpetuate American political life by establishing a system through which states, modeled according to the basic principles of the original thirteen, would be produced after a period of maturation.[81] The operation of this system arguably also contributed to the survival of American political life over time by facilitating unity among the states and providing a place to which disaffected, potentially destructive elements of society could emigrate.[82]

This reproductive function of the Ordinance is constitutional in two respects. First, it initially defined the process by which the majority of the states came into the Union, and it therefore played a crucial role in creating much of what is now the nation.[83] All territorial legislation is constitutional in this respect, but the Ordinance is preeminent because it set an example for later law.[84] Second, the reproductive activity of the Ordinance served a constitutional purpose in helping the nation to survive threats to its existence.[85] In other words, while reproductive legislation always aims to expand and perpetuate the political life of a nation over the long term, additional constitutional authority is due to reproductive legislation that enables the political entity to avoid specific threats of destruction. If the Constitution has constitutional authority for bringing our political system into being, a document that prevents our political system from being destroyed should be accorded similar authority.

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79. Stephen Fender writes that a major component of what he calls the second colonial phase of discourse about American identity involved the promise of "communal renewal of European culture in the limitless profusion of American nature." Stephen Fender, Constitutional Discourse: A Commentary, *in* Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution 33, 36 (Vivien Hart & Shannon C. Stimson eds., 1993). This phenomenon may have been an antecedent of the American impetus toward political reproduction expressed in the Ordinance.

80. See supra text accompanying notes 28–33.

81. See infra Part II.C.

82. See supra text accompanying notes 63–75.

83. See supra note 8 and accompanying text. Bestor asserts that "[t]he organization of new territories and the admission of new states were, after all, elements in a constitution-making process." Bestor, Civil War, supra note 20, at 338.

84. See supra note 8 and accompanying text.

85. See supra text accompanying notes 30–33.

In addition to addressing the various immediate threats to the life of the nation, the reproductive function of the Ordinance also addressed a threat that was more remote in time, but no less serious. With the passage of the Ordinance, the American government began a colonial enterprise.[86] As the states' own experience had shown, attempting to keep colonies in a state of subjugation once they have reached a certain level of economic and political maturity invites rebellion.[87] While colonial rebellion was costly for Britain, it posed no direct threat to its national sovereignty because the locus of hostility was an ocean away. In America, however, colonies were also neighbors, and their rebellion could be fatal to the new polity as a whole.[88] Thus the decision to make the territories into states on an equal footing with the components of the ruling nation—the decision to reproduce, rather than merely to colonize—responded in part to a specific fear of destruction resulting from colonial rebellion. As the primary embodiment of this decision, the Ordinance was designed to serve the constitutional function of protecting the nation against this kind of destruction.

B. *Conditions of Enactment*

The Ordinance also attains constitutional status by virtue, in a sense, of the timing of its enactment. In his book *We the People*,[89] Bruce Ackerman has proposed a theory of "dualist" democracy, which divides political activity into periods of "normal politics" and periods of "higher lawmaking."[90] Higher lawmaking occurs when certain "constitutional conditions" obtain, and their effect is to create or importantly reform the

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86. See Carter, supra note 4, at 18.

87. See Eblen, supra note 5, at 302, 311.

88. On post-revolutionary fears of national destruction, see Stewart, supra note 43, at 22–25; Onuf, Statehood, supra note 1, at 1.

89. 1 Bruce Ackerman, We the People: Foundations (1991). This book has many critics. See, e.g., William W. Fisher III, The Defects of Dualism, 59 U. Chi. L. Rev. 955 (1992) (book review); Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 Stan. L. Rev. 759 (1992) (book review); Frederick Schauer, Deliberating About Deliberation, 90 Mich. L. Rev. 1187 (1992) (book review); Suzanna Sherry, The Ghost of Liberalism Past, 105 Harv. L. Rev. 918 (1992) (book review). Most of the substantive criticism has focused on Ackerman's claim that the Founders contemplated constitutional reform outside the Article V amendment process, see, e.g., Sherry, supra at 923, or on the desirability of his prescriptive claims, see, e.g., Fisher, supra at 974–80; some have also criticized his use of history, see, e.g., Klarman, supra at 777–92. For a more favorable view of Ackerman's use of history, see Martin S. Flaherty, History 'Lite' in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 579–90 (1995). For a summary of some aspects of several critiques, and an interesting defense of Ackerman against them, see James W. Torke, "Grand Theory" and Constitutional Change, 26 Ind. L. Rev. 677 (1993) (book review) (arguing that criticizing "grand theory" of the kind Ackerman attempts on historical grounds misunderstands the essentially hortatory, rhetorical nature of the enterprise).

90. See 1 Ackerman, supra note 89, at 6–7.

constitution of the political entity.[91] Although this Note will not systematically test the Ordinance against Ackerman's conditions,[92] his argument that constitutional activity can and has taken place under conditions other than those prescribed by the existing constitution is useful. Regarding the acts of higher lawmaking he accepts as constitutional—the Founding, Reconstruction, and the New Deal—Ackerman writes that

> [i]f we return to our sources . . . [t]hey reveal both Reconstruction Republicans and New Deal Democrats engaging in self-conscious acts of constitutional creation that rivaled the Founding Federalists' in their scope and depth. In each case, the new spokesmen for the People refused to follow the path for constitutional revision set out by their predecessors . . . .[93]

If, as Ackerman suggests, certain conditions provide lawmaking with constitutional authority regardless of officially established procedures for higher lawmaking, then it is possible that the conditions that gave constitutional force to the Constitution itself may have done the same for other texts created during the same period, such as the Northwest Ordinance.

Frederick Schauer makes this argument clearly in his review of Ackerman's book. He begins by noting that it is widely accepted among legal theorists that "[t]he validity . . . of the highest law . . . is a political and sociological fact and not a legal question."[94] As a result, if particular aspects of a document are " 'part of' the Constitution, or not, because of supratextual or extratextual social decisions, then when society modifies its decisions in this regard the Constitution in any interesting sense changes as well."[95] Therefore, "the constitution of the United States might plausibly consist of the text of the Constitution itself; the Federalist Papers; Supreme Court decisions interpreting the Constitution of the United States; and parts of the Mayflower Compact, the Declaration of Independence, and the Emancipation Proclamation"[96]—and, this Note argues, the Northwest Ordinance.

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91. See id. Hyman seems to believe that the conditions of the period following the Revolution produced specially influential lawmaking. "[O]ngoing benefits derive from the fact that numerous connections existed between the Declaration of Independence, the Northwest Ordinance, and the Constitution, especially to its Bill of Rights, as well as to other contemporary creations including the first Judiciary Act." Hyman, supra note 22, at 29.

92. The following is Ackerman's most succinct description of these conditions:

> Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for "higher lawmaking."

1 Ackerman, supra note 89, at 6.

93. Id. at 44.

94. Schauer, supra note 89, at 1192.

95. Id. at 1193.

96. Id.

The process of social and political decisionmaking that Ackerman claims took place in the 1780s to make the Constitution constitutional[97] also applied, in a weaker but still sufficient sense, to the Ordinance. Admittedly, there was no special "Territorial Convention" for the Ordinance,[98] no ratification process, no "Territorialist Papers." But the level of public awareness of and concern with the problems that the Ordinance sought to resolve was high,[99] and the congressional effort to resolve these problems had been ongoing.[100] By the time the Ordinance was actually passed, it is reasonable to contend that the Continental Congress had attained special higher lawmaking authority of the kind Ackerman discusses.[101]

Other conditions identified by Ackerman as constitutional also apply to the Ordinance. Ackerman suggests not only that higher lawmaking *can* occur outside the framework established by the existing Constitution, but also that this kind of extralegality is a feature of our constitutional tradition.[102] In this light, the Ordinance's lack of authority under the terms of the Articles of Confederation[103] militates in favor of, not against, considering it to have constitutional authority. As Ackerman wrote regarding the Constitution,

> [T]here is a conceptual sense in which our very identification of the Founding as a Founding presupposes that the Philadelphia

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97. See 1 Ackerman, supra note 89, at 40–44 .

98. Ackerman does not, however, make a special process of constitutional delegation, such as the selection of delegates to the Federal Convention, a necessary constitutional condition. Ordinary lawmakers can become constitutionally empowered, provided other constitutional conditions obtain, as in Reconstruction and the New Deal. See id. at 44–50.

99. In support of his claim that the Ordinance was a political growth—not the result of Manasseh Cutler's influence—Frederick D. Stone notes that "it is doubtful if there ever was a time when the people of a country were more familiar with the principles of a government than were the inhabitants of the United States in 1787." Stone, supra note 13, at 340. Among these principles were those pertaining to the territories, as Onuf's numerous citations to pamphlets and newspaper articles of the period make clear. See, e.g., Onuf, Statehood, supra note 1, at 158 n.45–n.57.

100. See Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 253; John J. Gibbons, Intentionalism, History, and Legitimacy, 140 U. Pa. L. Rev. 613, 635 (1991) (stating that "[t]he Ordinance was the product of long and serious study"). Indeed, the first proposal to form a committee for dealing with the territories was made on the day the word that the peace treaty with England had been signed reached New York. See Bestor, Consensus, supra note 34, at 26. Furthermore, the roots of the Ordinance as it emerged are often traced to Maryland's refusal to ratify the Articles of Confederation without some promise that the territories would be used for the benefit of all the states. In reference to Maryland's refusal, Bestor wrote that "[t]he fate of the Union depended—and by no means for the last time—upon a satisfactory solution of the territorial problem." Id. at 19. Thus, at the time the Articles were proposed, the constitutional nature of the territorial issues the Ordinance ultimately resolved was apparent. That they were not addressed substantively in the Constitution itself may in large part have been the result of the fact that the Ordinance had already settled the question.

101. See 1 Ackerman, supra note 89, at 272.

102. See id. at 43–44, 173–75.

103. See supra note 78.

> Convention acted without legal warrant under the preexisting Articles. If this were not the case, the *real* Founders of our Republic were the folks who wrote and ratified the Articles of Confederation; the Philadelphia Convention simply gained the ratification of some sweeping "amendments" to the Founding document.[104]

The same reasoning applies to the Ordinance: If it had not exceeded the authority of the Articles of Confederation, then whatever power it had would have been due to the Articles, not to its independent force. But because the Continental Congress *did* exceed the authority of the Articles in enacting the Ordinance, the question of whether the Ordinance has independent authority of a constitutional character arises. The extralegality of the Ordinance helps make it eligible, so to speak, for constitutional status.[105]

Another important condition for constitutional authority noted earlier[106] is the existence of serious threats to the political life of the nation.[107] Quoting Federalist No. 49, Ackerman claims that "constitutional moments" arise in part from public-spiritedness facilitated by " 'danger which represse[s] the passions most unfriendly to order and concord.' "[108] The Constitution and the Ordinance can be seen as complementary responses to the dangers that existed after the War for Independence; the Constitution responded by addressing primarily the structural problems of the Union, while the Ordinance responded by attempting to perpetuate and proliferate a certain type of political life across time and territory.

The Ordinance benefitted from the authority granted by the constitutional conditions of the late eighteenth century in still another way. Some of the reasons advanced in support of the Constitution—such as the danger of factionalism and the value of an extended republic[109]—applied equally to the Ordinance;[110] insofar as popular acceptance of these reasons authorized the Constitution, they may also have authorized the Ordinance. Some evidence that this kind of overlapping support existed appears in Federalist No. 43, where Madison lamented the fact that the Continental Congress had to act without sanction from the Articles of Confederation in passing the Ordinance: "We have seen the inconvenience of this omission, and the assumption of power into which Congress

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104. 1 Ackerman, supra note 89, at 41–42.

105. Showing that it actually warrants constitutional status is the burden of this Part of the Note.

106. See supra text accompanying notes 85–88.

107. See supra text accompanying notes 28–33.

108. 1 Ackerman, supra note 89, at 176 (quoting The Federalist No. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961)); see also id. at 173–75 (discussing *Federalist*'s response to charges that the Constitutional Convention acted illegally).

109. See generally The Federalist No. 10 (James Madison) (discussing the Constitution's efficacy in limiting the harm caused by factions).

110. See supra text accompanying notes 28–33.

have been led by it. With great propriety, therefore, has the new system supplied the defect."[111] This was a criticism not of the legitimacy of the Ordinance, but of the inadequacy of the Articles. Indeed, in Federalist No. 38, after noting that Congress had been regulating the territories without the sanction of the Articles, Madison defended Congress's action:

> I mean not by anything here said to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects?[112]

Madison's argument for the Constitution on this point suggests the actual, as opposed to formal, legitimacy of the Ordinance; his argument is not "Accept the Constitution so that illegal outrages like the Ordinance will not occur," but something closer to, "Accept the Constitution so the Congress can take legitimate action like that of the Ordinance without the discomfort of having to step outside the bounds of formal authority." Madison was assuming the existence of broad support for the Ordinance[113] and trying to co-opt it to gain support for the Constitution. These quotations bolster David P. Currie's suggestion that the re-enactment of the Ordinance by Congress[114] was not intended to give the Ordinance real authority, but rather merely to harmonize it with the technicalities of the new federal structure—its independent authority, he contends, was taken for granted.[115]

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111. The Federalist No. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

112. The Federalist No. 38, at 239–40 (James Madison) (Clinton Rossiter ed., 1961). Justice Campbell in his opinion in *Dred Scott* was less troubled. Quoting Justice Chase, who was discussing the Constitution, Campbell wrote that

> it is in some measure true during the Confederation, that 'the powers of Congress originated from necessity, and arose out of and were only limited by events . . . ;' and there is only one rule of construction, in regard to the acts done, which will fully support them, viz.: that the powers actually exercised were rightfully exercised, wherever they were supported by the implied sanction of the State Legislatures, and by the ratifications of the people.

Scott v. Sandford, 60 U.S. (19 How.) 393, 504 (1857) (Campbell, J., concurring) (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796)).

113. Such support is also indicated when Madison writes that though the Continental Congress acted in the territories "without the least color of constitutional authority[,] . . . no blame has been whispered; no alarm has been sounded." The Federalist No. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961).

114. See supra note 78.

115. See Currie, supra note 53, at 845; see also id. at 842 ("One searches the Articles in vain to find even the slimmest reed to support the power of Congress to adopt such a measure. Yet under the Ordinance a federal territory was set up and governed with general acquiescence."). But see Hinsdale, supra note 7, at 278 (suggesting that "the silence and celerity with which the Ordinance was enacted was partly due to the fact that the Federal Convention was in session").

C. *Theory Of Original Political Legitimacy: Maturation*

Some of the constitutional character of the Declaration of Independence derives from its authoritative expression of the social compact theory upon which many have considered American constitutionalism to be based.[116] The Northwest Ordinance similarly draws constitutional force from its authoritative expression of an influential conception of original political legitimacy—in this case, the conception that political legitimacy is tied to the level of maturity of the community. The importance of organic models of political entities in American political thought has long been recognized. A quotation from Woodrow Wilson is representative:

> Our democracy, plainly, was not a body of doctrine: it was a stage of development. Our democratic state was not a piece of developed theory, but a piece of developed habit. It was not created by mere aspirations or by new faith; it was built up by slow custom. Its process was experience, its basis old wont, its meaning national organic oneness and effective life. It came like manhood, as a fruit of youth.[117]

The organic approach to political legitimacy is expressed in the Ordinance by the governmental scheme, in which self-governance is founded upon evidence of socioeconomic maturity (as indicated by population), rather than on social compact. Robert F. Berkhofer, Jr. notes that it was "well agreed upon by the end of the Revolution" that "statehood must evolve from a previous condition of subordination."[118] Participants in and commentators on the passage of the Ordinance at the time used the language of maturation, asserting that external government of western communities was necessary during their "infancy"[119] or before they had achieved "maturity."[120] This idea was founded in the States' own experience of a period of subordination as colonies followed

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116. See Paul A. Rahe, The American Revolution, *in* The American Experiment: Essays on the Theory and Practice of Liberty 27, 47–50 (Peter A. Lawler & Robert M. Schaefer eds., 1994).

117. Woodrow Wilson, Address: Nature of Democracy in the United States (May 10, 1889), *in* 6 The Papers of Woodrow Wilson 221, 229 (Arthur S. Link ed., 1969); see also Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture 19–20 (1986) (describing the later history of "organicism" in American constitutionalism).

118. Berkhofer, Territorial Evolution, supra note 16, at 47; see also Bond, supra note 31, at 235 (arbitrary government necessary to guide the territory through its crucial first stage); Eblen, supra note 5, at 295 (stating that Jefferson in the Virginia Constitution requires colonies to mature prior to being granted independence).

119. Letter from David Howell to Jonathan Arnold (Feb. 21, 1784), *in* William R. Staples, Rhode Island in the Continental Congress, with the Journal of the Convention That Adopted the Constitution 479 (Reuben A. Guild ed., Providence, Providence Press 1870).

120. Letter from New Hampshire Delegates to Meshech Weare, President of New Hampshire (May 5, 1784), *in* 7 Letters, supra note 63, at 513, 514.

by self-governance.[121] Whatever theories of the original legitimacy of political institutions the Founding generation may have preached elsewhere,[122] this is what they practiced when given the opportunity to facilitate the creation of new political institutions themselves. Because it both authoritatively expressed the organic conception of politics and put that conception into practice, the Ordinance should be regarded as having constitutional authority.

D. *Specific Historical Legacy: Territorial Expansionism*

The Ordinance was the first piece of legislation to address effectively the problems of the national domain, and it set a pattern that was followed in varying degrees by much subsequent territorial legislation.[123] As a result, the Ordinance is the foundational document of American expansionism, which has been a highly influential feature of American public culture. As Arthur Bestor noted, "[T]he United States has exhibited, during most of its history, a three-part structure. Besides the Union with its own Constitution and sphere of action, and the states with theirs, a third component has usually been in evidence—the territories."[124] As the founding document of this third part of the American political structure,[125] the Ordinance acquires a constitutional character.

The most prominent exponent of the idea of the frontier as a central element in American history was Frederick Jackson Turner.[126] Turner's central point was that the existence and advance of the frontier made America distinctive:

> Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions. The peculiarity of American

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121. See Carter, supra note 4, at 18 (noting that Ordinance "recapitulated the experience of the American states when they were colonies of Great Britain"); Bestor, Consensus, supra note 34, at 15 (observing that the Proclamation of 1763 established the practice of governing territories by stages in America); Eblen, supra note 5, at 311 (discussing role of Governor as "stabilizer" in the first stage); id. at 302 (stating that Congress solved British dilemma of what to do with mature colonies by granting them autonomy).

122. For the most prominent articulation of the Founding generation's political theory, see The Declaration of Independence para. 2 (U.S. 1776).

123. See supra note 8.

124. Bestor, Consensus, supra note 34, at 13.

125. Bestor sees the Ordinance as one of a group of texts forming "the American territorial constitution," id. at 17, but he would almost certainly acknowledge it as at least first among equals.

126. See Frederick Jackson Turner, The Significance of the Frontier in American History, Ann. Rep. Am. Hist. Ass'n 199 (photo. reprint 1966) (1894). For full-scale expositions of frontier history, see generally Billington, supra note 46; Thomas D. Clark, Frontier America (2d ed. 1969); Francis S. Philbrick, The Rise of the West: 1754–1830 (1965). For collections of essays in frontier history, including many critical of Turner, see The Frontier Thesis: Valid Interpretation of American History? (Ray A. Billington ed., 1966) [hereinafter The Frontier Thesis]; Historians and the American West (Michael P. Malone ed., 1983).

> institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life.[127]

Turner contended that the process of "perennial rebirth"[128] on the frontier defined American character. He argued that the markets and resources of the West decreased dependence on Europe, and that the economic and social conditions produced by the frontier reduced sectionalism, fostered individualism, and stimulated democracy.[129] Though many of these claims have been disputed,[130] and though Turner and his followers may at times have overstated the importance of the frontier,[131] few scholars would now deny that the frontier has been a defining national concern.[132] The Ordinance not only began the process of American territorial expansion, but it also codified the idea of "perennial rebirth" by establishing a governmental scheme dependent on maturation.[133] The Ordinance qualifies as a constitutional document because it

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127. Turner, supra note 126, at 199.

128. Id. at 200.

129. See id. at 219–23.

130. Collections of essays providing accounts of the debates surrounding Turner's thesis include The Frontier Thesis, supra note 126; Turner and the Sociology of the Frontier (Richard Hofstadter & Seymour M. Lipset eds., 1968); and The Turner Thesis: Concerning the Role of the Frontier in American History (George R. Taylor ed., 1972).

131. "The true point of view in the history of this nation is not the Atlantic coast, it is the great West." Turner, supra note 126, at 200. This sentiment can be traced at least as far back as Crévecoeur in 1783: "He who would wish to see America in its proper light . . . must visit our extended line of frontiers." J. Hector St. John de Crévecoeur, Letters from an American Farmer and Sketches of Eighteenth-Century America 72 (Albert E. Stone ed., Penguin Books 1981) (1782 (Letters from an American Farmer), 1925 (Sketches of Eighteenth-Century America)).

While these kinds of assertions overstate the case, they are perhaps explicable on Turner's part as products of his desire to gain attention for a neglected issue. Today, after that neglect has been remedied among historians, see supra notes 126 and 131,—largely due to Turner's efforts—it is easy to criticize his hyperbole. This neglect nonetheless appears to persist in legal academia.

132. "It is no exaggeration to say that after Turner presented his theoretical arguments [on the significance of the frontier], the telling of American history was never quite the same." Wilbur R. Jacobs, On Turner's Trail: 100 Years of Writing Western History 5 (1994). See also Historians and the American West, supra note 126, at 1–10; Richard White & Patricia N. Limerick, The Frontier in American Culture (James R. Grossman ed., 1994). One example of how scholars have understood the frontier since Turner is Rush Welter's claim that the shift in conservative attitudes toward the frontier "had large consequences for American social thought," and that "[b]y adopting new perspectives on western settlement, indeed, conservatives helped to define the terms in which the whole nation was to see itself." Rush Welter, The Frontier West as Image of American Society: Conservative Attitudes before the Civil War, 46 Miss. Valley Hist. Rev. 593, 594–95 (1960). Though he does not examine the issue, the Ordinance certainly influenced the dynamic Welter discusses.

133. See Part I.C.

inaugurated and shaped these important aspects of the nation's public culture.

E. *Value as a Source of Political Principles*

A final reason for ascribing constitutional authority to the Ordinance consists in its value as a source of principles according to which the polity has been governed. The value of the Ordinance as a source of principles has two components relevant to its constitutional authority. The first is its originality. As they are described in Part III, the principles reflected in the Ordinance—expansionism, development, imperialism, risk (both physical and economic), commercialism, and a certain strain of utopianism—do not figure prominently in presently recognized constitutional documents. Thus the Ordinance has a special claim to constitutional authority insofar as it is a founding text of those aspects of our political tradition that draw upon the principles it contains.[134]

The second component of the value of the Ordinance as a source of principles is its influence on national history—that is, the degree to which the principles in the document actually have guided the actions of the American polity. The Ordinance could, for example, have expressed a principle that governments should provide all their citizens with employment. This principle has not, however, guided the action of the national political entity at large, and so this hypothetical Ordinance would fail to have constitutional authority because the principle it expressed failed to guide political practice.

The Ordinance can claim the constitutional authority that derives from influence on at least one substantial basis—that its social vision, as represented in the articles of compact, nominally became the national societal ideal with the victory of the North in the Civil War.[135] For Ackerman, the political change resulting from the Civil War was on a par with that of the Founding itself.[136] Therefore, insofar as the Ordinance influentially articulated the national norm for society, endorsed (if not fully enforced) by the federal government after the War,[137] it attains constitutional status. The influence of the Ordinance in Northern ideology is fairly clear from numerous enthusiastic quotations from the antebel-

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134. Onuf noted one important way in which the Ordinance supplemented the Constitution, stating that the Ordinance "filled a crucial gap in the national Constitution" by setting out an enlightened colonial policy allowing settlements to ultimately become full States. See Onuf, Roots, supra note 17, at 250.

135. See Onuf, Statehood, supra note 1, at 141 (describing mid-nineteenth-century view that "the founding fathers of the Old Northwest were none other than the founders of the American nation itself."); Bestor, Civil War, supra note 20, at 350–52.

136. See 1 Ackerman, supra note 89, at 44.

137. The argument in the text does not claim that moral authority derives from historical survival or victory in war. The point is rather that the kind of authority we do in fact ascribe to the documents of our constitutional tradition is founded partly on historical developments, regardless of the acceptability of those developments under theories of political morality.

lum period,[138] in which it was sometimes seen as a semi-sacred text[139] delineating the truly American way of life.[140] Jordon Pugh's quotation at the beginning of this Note is one example.[141]

The argument for the Ordinance's influence here must be incomplete; to demonstrate that the principles of the Ordinance have substantially guided American political action would require a substantial work of political history.[142] In light of the Supreme Court's recognition of tradition as justifying certain constitutional doctrines,[143] however, such an undertaking could be especially worthwhile.

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When the Ordinance is examined from the several perspectives taken above, the constitutional character of its authority becomes visible. When a document has constitutional authority under the sense adopted

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138. See Onuf, Statehood, supra note 1, at 133–52.

139. See id.

140. This attitude toward the Ordinance was, according to Onuf, especially common among inhabitants of the Northwest. "By the eve of the Civil War many northwesterners had come to see the Northwest Ordinance as one of the great state papers of the founding era, perhaps even—in its guarantees of freedom and civil liberty—the most authentically 'American production' of them all." Onuf, Statehood, supra note 1, at 145. Hyman also notes that the Ordinance helped make the laws of the slaveholding states appear to be " 'something alien,' dangerous, diseased, and distorted." Hyman, supra note 22, at 29 (quoting Lawrence M. Friedman, The Law Between the States: Some Thoughts on Southern Legal History, *in* Ambivalent Legacy 30, 30 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984)).

141. See supra text accompanying note 1.

142. The scope of such a task is suggested by Hyman's claim that

> ongoing benefits derive from the fact that numerous connections existed between the Declaration of Independence, the Northwest Ordinance, and the Constitution, especially to its Bill of Rights, as well as to other contemporary creations including the first Judiciary Act. These links were, however unanticipatedly, to extend across decades in a manner to affect the configurations and character of the Thirteenth and Fourteenth Amendments of 1865 and 1868, and still further, to *Brown v. Board of Education* in 1954 and thus to our time.

Hyman, supra note 22, at 29. The strength of the "links" to which Hyman refers is uncertain.

143. In *Moore v. City of East Cleveland*, for example, the Supreme Court described the role of tradition in Due Process Clause jurisprudence, stating that it represents

> the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

431 U.S. 494, 501 (1977) (quoting Poe v. Ullman, 367 U.S. 497, 542–43 (1961) (Harlan J., dissenting)); see also Michael H. v. Gerald D., 491 U.S. 110, 122–27 (1989) (arguing for a narrow conception of tradition); id. at 137–42 (Brennan, J., dissenting) (arguing for a broad conception of tradition); Bowers v. Hardwick, 478 U.S. 186, 191–94 (1986) (emphasizing history in rejecting Due Process challenge to criminal sodomy law); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (Marshall, J.) (justifying the result "either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States").

in this Note, it means that the principles it expresses—and its expression of them—must be included in any analysis of American constitutional history that purports to be comprehensive.

III. The Principles Expressed by the Ordinance

Seen in the context of its passage and subsequent history, the Ordinance reflects a number of political principles that have been important to American political practice: expansionism, imperialism, development, commercialism, risk, and utopianism. This Part provides short accounts of these principles and of the roles they have played in the American political tradition.

A. *Expansionism*

The Ordinance was the first authoritative national document in the long history of American expansion.[144] Even after the fears of insurrection or invasion that partly motivated the passage of the Ordinance had subsided, expansion continued to be valuable in fostering internal political stability by providing the states with a unifying national concern.[145] Furthermore, as described in Federalist No. 10 shortly after the passage of the Ordinance, a larger country could encourage internal political stability by creating a greater plurality of interests, thereby making it difficult for a single faction to take control of the government and destroy its republican character.[146]

In addition to enhancing internal political stability, expansion was expected to produce a qualitatively better polity. Again in Federalist No. 10, Madison speculated that an extended republic would yield a higher grade of elected representatives.[147] Furthermore, the easy land acquisition that expansion made possible was thought to foster public virtue.[148] Land ownership and civic responsibility were thought to go hand in hand.[149]

The Ordinance, and particularly the social provisions of the articles of compact, also added a moral dimension to the value of expansion. Easterners saw white settlers on the frontier as "a mongrel breed, half

144. See supra Part II.D.

145. See supra Part I.A.

146. See The Federalist No. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961).

147. See id. at 82–83.

148. See Hyman, supra note 22, at 20; Berkhofer, Territorial Evolution, supra note 16, at 49; see also Ezra Stiles, The United States Elevated to Glory and Honor 8 (New Haven, Thomas & Samuel Green 1783) (claiming that "a free tenure of lands, an equable distribution of property, enters into the foundation of a happy state").

149. See Berkhofer, Territorial Evolution, supra note 16, at 51 (quoting Benjamin Rush, 1 Letters of Benjamin Rush 403 (Lynn H. Butterfield ed., 1951) (1786)); infra text accompanying notes 183–185.

civilized, half savage."[150] The male settler's livelihood, hunting, looked to Easterners like self-indulgence, because in the East hunting was largely considered a sport.[151] Crévecoeur, a leading contemporary commentator on American mores, also found fault with this practice, claiming that "the chase render[ed settlers] ferocious, gloomy, and unsocial."[152] In addition, the men's absence from home while hunting produced what from the Eastern perspective was the alarming spectacle of women working in the fields.[153] Frontier violence also failed to meet Eastern standards. There was no "just,"[154] Enlightenment-style[155] war in this region, such as that provided for by the Ordinance in reference to Native Americans;[156] instead there were small-scale raids and reprisals, which frequently involved torture inflicted by whites and Native Americans alike.[157]

The Ordinance explicitly responded to these Eastern attitudes about the degraded state of white frontier society. Eastern perceptions of ignorance among settlers were a clear source of the education provision.[158] The provisions securing property rights were also motivated by the desire to civilize the settlers. As Hyman asserted, it was expected that "[f]ee-simple ownership . . . would transform the frontier, where civilization was at risk, into settlements where morality and laws . . . would be honored."[159] Furthermore, the imposition of nonparticipatory government in the first stage of the regime established by the Ordinance reflected the widely held belief that the settlers were not fit to govern themselves.[160] Expansion thus took on added value by serving to enforce an officially sanctioned morality delineating the nature of civilized society.[161] This moral aspect of the Ordinance became more nationalistic in tone with the advent of "manifest destiny" rhetoric before mid-century.[162] It changed again in the antebellum period, when the slavery prohibition in the Ordinance became both an example of righteousness and an indict-

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150. Crévecoeur, supra note 131, at 77.

151. See Cayton, supra note 44, at 1, 11.

152. Crévecoeur, supra note 131, at 76.

153. See Cayton, supra note 44, at 11.

154. See The Northwest Ordinance art. 3. On Congress's sense of justice with respect to war in the territories, see infra notes 170–174 and accompanying text.

155. See, e.g., Russel F. Weigley, The Age of Battles: The Quest for Decisive Warfare from Breitenfeld to Waterloo 54, 194–95, 265–67 (1991) (describing emphasis on reason, moderation, and professionalism in Enlightenment conceptions of war).

156. See The Northwest Ordinance art. 3.

157. See, e.g., Cayton, supra note 44, at 6 (explaining that "[t]he Indians, Anglo-Americans, and French living in or near the Northwest Territory in the late eighteenth century . . . often dealt with each other through brutal torture and murder.").

158. See Finkelman, supra note 52, at 9–10.

159. Hyman, supra note 22, at 23–24.

160. See Onuf, Statehood, supra note 1, at 43, 45.

161. The moral component of expansionism clearly had roots in British colonial practice in America, as mentioned above. See Fender, supra note 79, at 36.

162. See Reginald C. Stuart, United States Expansionism and British North America, 1775–1871, at 79–105 (1988).

ment of institutionalized corruption, giving the document as a whole the character of a Biblical prophecy in the rhetoric of the day.[163]

B. *Imperialism*

The most clearly imperialist aspect of the Ordinance is the governmental scheme, which essentially follows the pattern of British colonial rule in America.[164] In the first "autocratic" stage of government (when congressional appointees ruled without the participation of the populace), the territories were wholly subordinated to Congress; in the second "colonial" stage (when a local legislature was added), the territorial districts were still subject to substantial control by Congress, though they were allowed a measure of self-government. Furthermore, the rhetoric of empire was commonly used regarding the territories, though the concept of subordination which forms a necessary part of the modern idea of imperialism was not always involved in these statements. The concept of "empire" at the time did not refer only to "the rule of alien lands and peoples for profit,"[165] but also to a polity that was geographically vast, composed of diverse communities.[166] Thus, Jefferson wrote of "an empire for liberty,"[167] and a friend of his wrote that the Ordinance of 1784 aimed to establish " 'a colossal empire, a Union which new nations, not yet in existence, will consent to join as time goes on.' "[168] "Empire" in the American sense could include both liberty and consent.

The central difference between the imperialism of the Ordinance and that of Britain was that the Ordinance promised the communities it regulated full statehood once they became sufficiently populous, while contemporary British conceptions of colonial rule contained no viable

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163. See Onuf, Statehood, supra note 1, at 129–30, 135 (describing the transformation of the Ordinance into a "higher law" in the context of antebellum debate over slavery); Finkelman, supra note 50, at 62 (quoting Salmon P. Chase's comment that the Ordinance was "a pillar of cloud by day, and of fire by night"). On the role of the prophetic mode of discourse in America, see generally Sacvan Bercovitch, The American Jeremiad (1978).

164. See Carter, supra note 4, at 24.

165. Stuart, supra note 162, at 98.

166. See Samuel Johnson, A Dictionary of the English Language (photo. reprint 1979) (1755) (defining "empire" in part by quoting Sir William Temple: " 'A nation extended over vast tracts of land, and numbers of people, arrives in time at the ancient name of kingdom, or modern of *empire*.' ").

167. Letter from Thomas Jefferson to James Madison (Apr. 27, 1809), *in* 12 The Writings of Thomas Jefferson 274, 277 (Albert E. Bergh ed., 1907); see also Stuart, supra note 163, at 6; The Federalist No. 14, at 104 (James Madison) (Clinton Rossiter ed., 1961) (contemplating "one great, respectable, and flourishing empire").

168. Berkhofer, Republican Origins, supra note 17, at 154. An early view of Jefferson's Ordinance held it to be nonimperialistic because it contained no autocratic phase of government. See Berkhofer, Jefferson and the Ordinance of 1784, supra note 34, at 231, 231 n.1. It did not, however, permit total political self-determination on the part of the settlers. See Eblen, supra note 5, at 298.

alternative to subordinating the colonies.[169] Britain's more restrictive attitude toward colonial rule arguably made the Revolution inevitable.[170] The American scheme (in addition to being a prudent application of experience) should thus be understood as somewhat weakly imperialist in its political aspect. While the governmental plan of the Ordinance did seek to control and alter existing communities to serve the ends of the central government, it was not ultimately concerned with the domination or exploitation of communities perceived as foreign, as the strong conventional notion of imperialism requires.[171]

Rather, the Ordinance intended the creation of new political entities in a realm which, as far as Easterners were concerned, had none.[172] Even with respect to Native American polities, the plan of the Ordinance was not imperialistic in the sense described above. While the Ordinance did consider them to be foreign political entities, it reflects no intention to enter into an imperialist governmental relationship with them; rather, it reflects an intention to evict[173] or destroy them if necessary.[174] Regardless of who was currently occupying the soil in the Northwest Territory, the Ordinance expected that the Saxon race would inherit it, as Pugh correctly perceived.[175] The consequences of Native American opposition to Anglo dominance in the region were fairly directly stated in the provision for "just and lawful wars authorized by Congress" against Native Americans.[176] "Just and lawful wars" were almost certainly understood to include wars directed against groups who stood in the way of expansion; Congress during this period felt "justified" in taking military action against white squatters in the region based on their uncivilized character and because they "threatened the orderly process of settlement. . . ."[177] It

169. See Bond, supra note 31, at 222.

170. See id.; Eblen, supra note 5, at 302. Eblen notes, however, that the legality of the Ordinance was questionable and that it did not bind Congress to fulfill its promise. See id.

171. See supra note 165 and accompanying text.

172. Manasseh Cutler praised the territory as a place for settlement and growth because in it there was "no rubbish to remove." 2 Life, Journals and Correspondence of Rev. Manasseh Cutler, LL.D. 404 (William P. Cutler & Julia P. Cutler eds., 1987) [hereinafter Cutler]. The imperialist character of the political scheme is also weakened by the fact that some of the white societies it sought to alter desired the alteration. See Alden, supra note 34, at 472.

173. George Washington predicted that "the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire." Letter from George Washington to James Duane, supra note 42, at 140.

174. The provision in the Ordinance for "just and lawful wars" with the Native Americans implicitly reflects this intention. See The Northwest Ordinance art. 3. On early national policy regarding Native American communities, see Russel L. Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty (1980); Reginald Horsman, Expansion and American Indian Policy, 1783–1812 (1967); Francis P. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780–1834 (1962).

175. See supra text accompanying note 1.

176. The Northwest Ordinance art. 3.

177. Onuf, Statehood, supra note 1, at 31.

is hard to imagine that it intended to hold itself to a higher standard of justice with respect to Native Americans.

Though the political scheme of the Ordinance was not strongly imperialistic in the conventional modern sense, the central government was nonetheless very actively involved in the process of expansion. The idea that the West was settled via some spontaneous libertarian process of settlement and growth, with the government only intervening to protect the populace against foreign violence, neglects the array of federal administrative entities that were deployed in the service of expansion.[178] The army itself spent more time building roads and otherwise assisting community growth than it did fighting.[179] The exertion of central control was substantial; Clarence E. Carter has argued that "from the advent to the conclusion of this territorial phase, the central government in Washington held a tighter rein over administration than had ever been true in the comparable British system, from which the forms in the United States were derived."[180] Thus, while the statehood guarantee weakened the imperialist character of the Ordinance, the significant extent of central control exerted prior to statehood strengthened it.

The Ordinance was also imperialist in a certain cultural sense, in that it sought to change the subsistence economy of white frontier society into an Eastern-style economy based on maximizing productivity. As noted,[181] frontier life revolved around hunting, trading, and subsistence agriculture, and these practices posed a problem from an Eastern perspective, in that they degraded the moral and social condition of the settlers. But there was also another problem with this state of affairs: without a change in economic culture that would increase the productivity of frontier resources, sophisticated Eastern-style society would not develop, and all the goals of expansion would be frustrated.[182] Thus, frontier attitudes toward resources had to change, not merely for the good of the settlers, but for the good of expansionism itself. In working to subjugate frontier culture to accommodate the goals of the central government, the Ordinance fulfilled a more strongly imperialist function.

The effects of this "economic/cultural imperialism" were described well at the time by members of one community in the region:

> [C]hiefly addicted to the Indian trade[, we had,] . . . in a great measure, overlooked the advantages that can be derived from the cultivation of lands . . . . Contented to raise bread for our families, we neither extended our culture for the purpose of exportation, nor formed an idea of dividing among ourselves our

178. Elements of the Departments of State, War, and Treasury were all involved in expansion from early on. See Carter, supra note 4, at 20, 24–26.

179. See Francis P. Prucha, The Physical Attack upon the Wilderness, *in* The West of the American People, supra note 17, at 121, 122.

180. Carter, supra note 4, at 24.

181. See supra text accompanying notes 150–157.

182. See Onuf, Statehood, supra note 1, at 10, 26–27, 32–33, 36; Cayton, supra note 44, at 8–10.

> fruitful country. . . . The moment we were connected with the United States, we began to be sensible of the real value of lands . . . .[183]

Sensibility of the value of lands involved ideas about well-defined, long-term ownership of property that were crucial to the entire commercial, political, and moral project of the Ordinance.[184] The Ordinance's property provisions provided a basis for enforcing exactly this sensibility, and perhaps because this attitude toward resources was the *sine qua non* of expansion, the property provisions appear as the first major section of the document.[185] The governmental scheme was also crafted to induce Western adherence to Eastern economic culture; by deferring self-government until the population had significantly increased, the Ordinance gave the Eastern attitudes toward resources established in the property provisions an opportunity to take hold.

C. *Development*

The importance of changing the frontier economy was reinforced by a general moral imperative to develop natural resources. Failing to make the best use of nature's gifts was seen as a rejection of divine Providence, and more particularly, as contrary to the American penchant for frugality.[186] Supporting these feelings was a fear about survival:

> If the soil is naturally fertile, little labour will produce abundance; but, for want of exercise, even that little will be burthensome, and often neglected:—*want will be felt in the midst of abundance*, and the human mind be abased nearly to the same degree with the beasts that graze the field.[187]

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183. Petition of the Inhabitants of Post Vincennes (July 26, 1787), *in* 2 The Territorial Papers of the United States 58 (Clarence E. Carter ed., 1934–1962). While the authors of this document were French, the economic culture it describes obtained in white frontier society generally. See Cayton, supra note 44, at 11–13. Eblen argues that the governmental aspects of the Ordinance were included for the benefit of non-English Westerners, to "initiate them into the mysteries of republicanism," and not for English settlers, few of whom "were likely to believe their rights and institutions did not accompany them." Eblen, supra note 5, at 313. The validity of this claim is questionable, but if proved to be true, it would indicate that the Ordinance was imperialistic in another way—it attempted to impose a political ideology on communities of foreign nationals.

184. See Onuf, Statehood, supra note 1, at 39–40 (describing importance of having frontier settlers who are "capable of putting [their] property to immediate productive use and therefore justifying its price."); cf. Cayton, supra note 44, at 12 (describing clash between economic goals for frontier and existing frontier economic culture).

185. See The Northwest Ordinance § 2. In this light, the claim cited by Onuf that the Ordinance was "poorly organized" appears to be unjustified. See Onuf, Roots, supra note 17, at 250.

186. See, e.g., Nathaniel Niles, Two Discourses on Liberty, *in* American Political Writing During the Founding Era 257, 267–68 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

187. Onuf, Statehood, supra note 1, at 9 (quoting "Americanus," On American Manufactures, 1 Columbian Mag. 1, 27n. (1786) (citing James Anderson, Observation on the Means of Exciting a Spirit of National Industry, Letter IV (1777))).

Peter S. Onuf, referring to this quotation, has identified the scene it describes as "the nightmare of underdevelopment."[188] The idea of "want . . . in the midst of abundance" expresses a fear of inexplicable inability to survive, arising from the incommensurateness of the image: how could abundance, human genius, and deprivation possibly ever exist in the same place at once? Allowing this to occur would, as the above quotation suggests, be a denigration of one's humanity and presumably also an affront to God.[189] In this light, development of the West appeared to be good not only for the nation, but also for the soul.[190]

The governmental provisions of the Ordinance also helped make development of the land in the territories morally desirable. Under the Ordinance, a settlement's progression from one system of government to the next depended on its population; the more developed a region became, the more political liberty was granted to its occupants, until it graduated to the highest form of local government—statehood. By linking increasing development to increasing political freedom in the governmental provisions,[191] and by promising settlers a humane society in the articles of compact, the Ordinance substantially increased the moral value of development. Furthermore, the correlation in the Ordinance between increasing productivity/population and civil liberty implies no necessary stopping point, thereby creating a program for eternal territorial expansion. The commitment to unending development in the Ordinance also authoritatively expresses one aspect of the American ideal of progress.[192]

D. *Commercialism*

On the most basic level, the Ordinance expresses a principle of commercialism in that its drafting and passage were partly motivated by a congressional need for funds.[193] As described above, the Ordinance served this purpose by making the land in the Territory more salable.[194] In addition, the goal of changing territorial settlements into Eastern-style communities was to be achieved by increasing the wealth of the settlers. Benjamin Rush described this process:

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188. Onuf, Statehood, supra note 1, at 9.

189. See id. (describing economic development as means to " 'improve the bounties of a divine Providence,' ") (quoting Maryland Gazette, Apr. 17, 1787).

190. See Stiles, supra note 148, at 8.

191. See Onuf, Statehood, supra note 1, at 59.

192. See Robert F. Berkhofer, Jr., Space, Time, Culture and the New Frontier, *in* The West of the American People, supra note 17, at 30, 35 ("The uniqueness of the frontier is basically not one of place, but of time."); Arthur M. Schlesinger, What Then Is the American, This New Man?, *in* The West of the American People, supra note 17, at 525, 530 ("The American glorified the future in much the same spirit as the European glorified the past, both tending to exalt what they had most of.").

193. See supra text accompanying note 53.

194. See supra text accompanying notes 54–62.

> In proportion as he increases his wealth, he values the protection of laws. Hence, he punctually pays his taxes toward the support of government. Schools and churches likewise, as the means of promoting order and happiness in society, derive due support from him; for benevolence and public spirit as to these objects are the natural offspring of affluence and independence.[195]

The Ordinance was intended to increase settlers' wealth by providing them with easy access to land, thereby stimulating the development of the public virtues Rush described.[196]

The Ordinance also endorses commercialism in its provision ensuring the enforcement of contracts.[197] George F. Hoar in 1887 devoted a portion of a speech to the clause:

> For the first time in history the Ordinance of 1787 extended that domain from which all human government is absolutely excluded by forbidding any law interfering with the obligation of good faith between man and man. This provision, adapted afterward in the Constitution of the United States, and thereby made binding as a restraint on every state, is the security upon which rests at last all commerce, all trade, all safety in the dealing of men with each other.[198]

As Hoar suggests, the Ordinance contract clause represents the exclusion of the government from involvement in private economic dealings, contributing perhaps to the view of the frontier as a realm of private initiative.[199]

The Ordinance can also be seen as commercialist because of the role commercial interests, such as those represented by Manasseh Cutler and the Ohio Company, played in its drafting and passage.[200] The amount of influence actually exercised upon Congress by commercial interests with respect to the passage of the Ordinance has been disputed. On the one hand, Theodore Pease has said that "the ordinance was only one move in the game of bargaining between the Congress and the Ohio Company."[201] On the other hand, Jack E. Eblen has denied that Cutler

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195. Berkhofer, Territorial Evolution, supra note 16, at 51 (quoting Benjamin Rush, Letters of Benjamin Rush 403 (Lyman H. Butterfield ed., 1951)).

196. See Hyman, supra note 22, at 19.

197. See Merriam, supra note 47, at 331. Legal scholarship referring to the contract clause in the Ordinance includes Douglas W. Kmiec & John O. McGinnis, The Contract Clause: A Return to the Original Understanding, 14 Hastings Const. L.Q. 525, 530 (1987); Michael W. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Cal. L. Rev. 267, 276–77 (1988); Thomas W. Merrill, Public Contracts, Private Contracts, and the Transformation of the Constitutional Order, 37 Case W. Res. L. Rev. 597, 600 (1987).

198. Merriam, supra note 47, at 332 (quoting George F. Hoar, Marietta Oration (Washington, D.C., Judd & Detweiler 1887)).

199. See supra text accompanying notes 129–33.

200. See supra text accompanying notes 54–62.

201. Pease, supra note 9, at 167; see also Onuf, Roots, supra note 17, at 255 (noting that providing for statehood was insufficient; it was also necessary to spur settlement).

or the Ohio Company had any significant effect on the passage of the Ordinance.[202] It seems likely, however, that if the Ohio Company had not offered to buy over a million acres of land in the Territory, Congress would not have passed the final draft of the Ordinance when it did.[203] Furthermore, in a contemporaneous diary entry, Cutler claims that he submitted some suggestions for amendments to the Ordinance, and that all were adopted except one on taxation.[204] Although the evidence available does not identify the adopted provisions,[205] Cutler and the Ohio Company almost certainly had some effect on the process.

Even if Cutler had never arrived on the scene, however, the Ordinance could not have been free of commercial influence; pressure by commercial agents had been a fixture of western policy-making since its origin.[206] For example, when the question of whether the landholding states would cede their claims to the national government was being considered, delegate Arthur Lee expressed alarm: "These Agents are using every art to seduce us and to sow dissension among the States, I think they are more dangerous than the Enemy's Arms. Every Motion relative to Vermont and the Cessions of the other States is directed by the interests of these Companies."[207] In addition to the exertions of agents, the self-interest of the many delegates who were investors in these companies also threatened to control matters.[208] When Lee demanded that the delegates state their interests in the companies, consideration of the cessions was postponed.[209]

But Lee's attitude was becoming anachronistic. The 1780s saw the emergence of a new vision of the public good that was consistent with self-interest and private enterprise, and one of the most significant effects of the Ordinance may have been its contribution to this trend.[210] Earlier

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202. See Eblen, supra note 5, at 294 (Ordinance not an adjunct to the Ohio Company's land scheme, not enacted under pressure from Cutler; Cutler had "little if any influence over the final form or content of the Ordinance").

203. William F. Poole reportedly claimed that the Ordinance was a *sine qua non* of the Ohio Company's proposed land purchase. See Galbreath, supra note 45, at 152–53 (quoting William F. Poole, Address Before American Historical Association (Dec. 26, 1888)). As Galbreath notes, Poole's claims seem too strong for the evidence. See id. However, it was probably not accidental that Cutler's visit to New York to negotiate the land purchase with members of Congress coincided almost exactly with the legislative activity resulting in the passage of the Ordinance. See Hinsdale, supra note 7, at 268–69; 1 Cutler, supra note 172, at 225–42 (describing visit to New York and Congress).

204. See 1 Cutler, supra note 172, at 293.

205. Some think that Cutler contributed some of the articles of compact. See, e.g., Galbreath, supra note 45, at 153 (quoting William F. Poole, Address Before American Historical Association (Dec. 26, 1888)); Merriam, supra note 47, at 341.

206. See Jensen, supra note 26, at 324–32.

207. Letter from Arthur Lee to Samuel Adams (Apr. 21, 1782), *in* 6 Letters, supra note 63, at 331.

208. See Jensen, supra note 26, at 332.

209. See id.

210. See Onuf, Statehood, supra note 1, at 32, 34; Berkhofer, Territorial Evolution, supra note 16, at 52.

American notions of virtue had seen self-interest as basically immoral,[211] but the conception of liberty that arguably formed the foundation of American political theory saw no inherent conflict between individual liberty and the common good.[212] At the same time, Madison and other political thinkers felt that such conflicts would frequently and inevitably arise, and that therefore a chief purpose of government should be to channel the forces of self-interest toward the general welfare.[213] Add to this a belief that liberty is only valuable in a world of abundance,[214] which Western development could create, and the Ordinance appears as a machine for channelling the self-interest of settlers and commercial interests and turning it into an increasing fund of liberty for the nation (and the world) as a whole.[215]

E. *Risk*

Connected to its association with commercialism is the Ordinance's endorsement of physical and financial risk as inherently good. The income the federal government hoped to derive from the sale of the lands was to come primarily not from sales to individual settlers, but from selling large quantities of land at reduced rates to speculators like the Ohio Company.[216] It is not a large step from the belief, described above, that pure self-interest is consonant with the public good, to the belief that profit-seeking and the financial risk it entails are good in themselves. It may be that such a step was easier to make once the Ordinance had lent the sanction of national authority to land speculation by seeking to ensure its profitability.

Physical risk on the frontier was similarly valorized. According to publicists at the time, the main achievement of the early settlers was to "peril the wilderness and the savage foe" to "purchase a country and a *home* in the west . . . for *us*."[217] Through much of American history, the West has been seen as a realm in which wealth is interconnected with risk of one kind or another. The sources of this image range from the Gold

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211. See Lutz, supra note 18, at 29; Onuf, Statehood, supra note 1, at 13.

212. See Lutz, supra note 18, at 75; Cathy D. Matson & Peter S. Onuf, A Union of Interests: Political and Economic Thought in Revolutionary America 16–17 (1990); Onuf, Statehood, supra note 1, at 13–14.

213. See The Federalist No. 10 (James Madison); Alexis de Tocqueville, Democracy in America 89, 98 (Phillips Bradley ed., Francis Bowen & Henry Reeve trans., 1945) (defining "centralized government" as government of common interests, and describing how it directs private interest toward the public good in America); Onuf, Statehood, supra note 1, at 2.

214. See Onuf, Statehood, supra note 1, at 13.

215. See id. at 137.

216. See id. at 42–43; Eblen, supra note 5, at 313 n.37; Pease, supra note 9, at 167.

217. Onuf, Statehood, supra note 1, at 137.

Rush to Las Vegas,[218] and from Western films[219] to the S & L scandal.[220] The process of settlement instituted by the Ordinance, in which purchase and peril were intertwined values, was the first authoritative national contribution to this phenomenon. By thus giving force to the notion that personal risk is inherently valuable, the Ordinance may have helped foster an intellectual trend that contributed to the rise of American capitalism in the nineteenth century.

F. *Utopianism*

As suggested above, the drafters of the Northwest Ordinance were trying to create an ideal social order from scratch[221] in a place where, as Manasseh Cutler explained, there was "no rubbish to remove."[222] Another writer saw the territories as an opportunity to create "a world within ourselves."[223] As Harold M. Hyman noted more recently, "The Northwest Ordinance described the future Union of the states as it should be. The Ordinance, like the Constitution, was a vision as well as a blueprint for immediate implementation."[224] The utopian aspect of the Ordinance—its description of the nation "as it should be"—appears most clearly in the social provisions of the articles of compact.[225] The Ordinance was the first law by which the national government attempted to regulate social issues, and its vision is more comprehensive than that of the Constitution. In addition to setting out the rights and duties of individuals, the Ordinance established positive moral goals for the communities it governed, such as the encouragement of education and of good relations with Native Americans.[226] The enforceability of the rights and duties it set out was doubtful, however, and Congress lacked the re-

218. See Robert G. Athearn, The Mythic West in Twentieth-Century America 121–22 (1986).

219. See Will Wright, Six Guns and Society 97–100 (1975) (describing "professional" narrative in westerns, in which protagonists fight to gain money, rather than to defend worthy causes).

220. The association of the savings and loan debacle with the West is indicated by the fact that cost of bailing out the savings and loans in Texas and California constitutes 91.7 percent of the total bailout cost. Lawrence M. O'Rourke, Assessing Blame: Politicians Dodging Issue of Costly S & L Bailouts, St. Louis Post-Dispatch, July 22, 1990, at 4B. References to cowboy imagery suggesting the interconnection of risk and wealth have been commonplace in press coverage of the S & L scandal. See, e.g., Peter Passell, Economic Scene: No Accounting For Bad Banks, N.Y. Times, Jan. 16, 1991, at D2. The Wild West association was intended by the institution in at least one case: John Wayne was a commercial spokesperson for Great Western Savings and Loan, see Howard Rosenberg, Landon's Charm Eerily Lives on in Infomercials, L.A. Times, Aug. 7, 1991, at F1, and after his death an equestrian statue of the actor was installed at the bank's building in Beverley Hills. See Henry Kamm, John Wayne Rides Again, N.Y. Times, June 24, 1984, § 2, at 1.

221. See Gibbons, supra note 100, at 635.

222. See supra note 172.

223. Onuf, Statehood, supra note 1, at 14.

224. Hyman, supra note 22, at 28.

225. The Northwest Ordinance art. 1–6.

226. Id. art. 3.

sources to pursue substantively the positive moral goals it established. As a result, the society outlined in the Ordinance is utopian not only because it seeks social improvement, but also because it is almost totally impractical.[227]

The utopianism of the social provisions is also discernible in the tone of some of their language, which markedly differs from that of comparable provisions in the Bill of Rights. Consider Article One of the articles of compact in the Ordinance: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."[228] This language is almost narrative in style.[229] By describing the kind of person to which the prohibition will apply, it evokes the image of a specific individual more fully than the impersonal "Congress shall make no law" in the the First Amendment,[230] or than the spare "No person shall" in the Fifth Amendment.[231] Furthermore, in stating that the prohibition will last forever, and that it will apply "in the said territory," the provision enters a worldly context of time and place. By contrast, the provisions in the Bill of Rights do not specify their geographical or temporal jurisdiction, making them more abstract, less mundane, and also more magisterial and powerful. The Ordinance adopts a similarly commanding, distant tone in provisions which—unlike the social provisions—were fully supported by congressional power, such as the provision delimiting the number of states to be created: "There shall be formed in the said territory, not less than three nor more than five States. . . ."[232] By comparison, the Ordinance's religious freedom provision seems like a childish wish, not a law. Similar points could be made about others (but not all)[233] of the social provisions.

Perhaps surprisingly, the lack of power behind the social provisions contributed to their popularity;[234] these provisions have received some of

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227. See Webster's Third New International Dictionary 2525 (Philip B. Gove ed., 1981).

228. The Northwest Ordinance art. 1.

229. On narrativity and constitutional texts, see generally Wayne Franklin, The US Constitution and the Textuality of American Culture, *in* Writing a National Identity, supra note 79, at 9. Referring to his idea of "ideal American text[s]," Franklin claims that, "[s]uch texts, whether they were graphic renderings of space or political delineations of an institutional structure, implicitly narrated the future. This was to become a crucial function of American texts, and of the Constitution supremely." Id. at 16.

230. U.S. Const. amend. I.

231. Id. amend. V.

232. The Northwest Ordinance art. 5.

233. The slavery provision notably lacks these qualities. See The Northwest Ordinance art. 6. The point emphasized here, however, is not that these characteristics were programmatically applied to all the social provisions, but rather that it is in the context of such provisions that this voice surfaces.

234. Onuf describes how praise of the Ordinance grew as, and because, its lack of legal force became more apparent. See Onuf, Statehood, supra note 1, at 133–52 (Chapter 7, "From Constitution to Higher Law").

the most emotional praise directed at the Ordinance.[235] Their lack of practical authority made the social provisions seem like professions of faith in the goodness of the future inhabitants, and the fact that some of the social conditions they described (e.g., the elimination of slavery and the establishment of public education) came to pass seemed like a gift from a supremely wise, beneficent Deity.[236] Another highly praised aspect of the Ordinance has been the provision guaranteeing new states admission to the Union on an equal footing.[237] Congress arguably had the power actually to admit the states to the Union at the time the Ordinance was passed, but the provision that it would do so at some time in the future was an entirely gratuitous promise, which it nonetheless kept. The magnanimity of this promise, in light of its having been kept, has been admired by historians in several generations.[238] The Midwestern States did, in a sense, owe the Ordinance gratitude of the same kind some feel is due to a Deity—gratitude for their creation and for the circumstances they enjoyed, which it did not have to provide. The ideological importance of the Ordinance as a utopian text, creating the idealized conditions enjoyed by the territory states, thus depended in part on its lack of specific authority. This aspect of the Ordinance had its most significant effects in helping to draw the ideological battle lines of the Civil War.[239]

Correspondingly, the utopian, imaginary qualities of the social provisions were expressed most clearly during the antebellum period with respect to the slavery prohibition. The contention among antislavery advocates that the Ordinance freed slaves travelling in the North produced rhetoric suggesting that the free states were enchanted lands. One lawyer argued that "[o]n the coming of the slave into the free state, by the mere force of the prohibition, his shackles fall from him."[240] The idea of the Territory as a supernatural area was also suggested when the Ohio River was described as being "like the fabled Styx, the river of death, which, if once crossed, can never be recrossed."[241] Perhaps contributing to the prevalence of this kind of imagery was what Arthur Bestor has described as the "growing retreat from reality"[242] that took place in the country as the slavery struggle intensified. Bestor described how the attention of the country was "diverted from the fundamentals of slavery in its moral, economic, and social aspects," and instead "became focused on the collateral

235. See supra note 9.

236. See Onuf, Statehood, supra note 1, at 133–52.

237. See The Northwest Ordinance art. 5.

238. See Onuf, Statehood, supra note 1, at 133, 135, 138, 140; Cayton, supra note 151, at 20.

239. See Onuf, Statehood, supra note 1, at 148–49, 151; Finkelman, supra note 52, at 62.

240. Strader v. Graham, 51 U.S. (10 How.) 82, 92 (1850) (argument of counsel for plaintiffs).

241. Id. at 90.

242. Bestor, Civil War, supra note 20, at 339.

problem as to what Congress should do with respect to slavery in the territories."[243] This phenomenon was identified at the time by a member of the House of Representatives from the South, who commented that "[t]he whole controversy in the Territories . . . related to an imaginary negro in an impossible place."[244] This retreat from reality was in part facilitated by the character of the Ordinance itself.

IV. Modern Implications of the Principles Expressed by the Ordinance

Attention to the principles reflected in the Ordinance could enrich scholarship on some contemporary issues by putting them in the context of a more complete account of our constitutional history. In general, the strand of our constitutional tradition emanating from the Ordinance involves a more substantial role for national government than that which the Constitution formally set out. In the tradition of the Ordinance, one function of national government is that of formulating and fostering a social vision for the nation, as in the social provisions[245] and the mechanisms of expansionism[246] contained in the Ordinance. Another function is that of establishing objects of concern—such as the frontier—which enable the various parts of the nation to cooperate in achieving a goal.[247] Furthermore, the Ordinance indicates that an essential element in our constitutional culture has been the cooperation of the national government with private commercial interests in setting and pursuing national policy.[248] That this kind of activity is in fact a part of the political world in which we live is old news, but the Ordinance suggests that harmonizing private financial interest with the public good has been a basic function of national government from the very beginning.

One current issue to which the tradition of the Ordinance may be pertinent is that of government social programs.[249] Under the vision of the Ordinance, the role of national government is not simply to ensure minimal conditions for the enjoyment of liberty, but to actively foster the diffusion of liberty and to increase its value by increasing wealth. In 1787, westward expansion was intended to fulfill these functions for the foreseeable future. It was essentially the first big government project, the first social program, and this suggests that the establishment of the welfare

243. Id. at 339.

244. 1 James G. Blaine, Twenty Years of Congress: From Lincoln to Garfield 272 (Norwich, Conn., The Henry Bill Publishing Co. 1884) (citing "a witty representative from the South").

245. See supra Part III.F.

246. See supra Part III.A.

247. See supra text accompanying notes 70–71.

248. See supra text accompanying notes 200–215.

249. See R.W. Apple, Jr., You Say You Want a Devolution, N.Y. Times, Jan. 29, 1995, § 4, at 1.

state in the 1930s may not have been as revolutionary as has sometimes been claimed.[250]

Study of the principles in the Ordinance might also bear upon recent trends in American international trade. For example, the North American Free Trade Agreement (NAFTA), in creating a single market of the United States, Canada, and Mexico, has been seen as a work of economic expansionism, and described in terms reminiscent of those once used in describing the Ordinance.[251] Furthermore, the moral value placed on development in the Ordinance[252] finds a modern parallel in claims by free trade proponents that such measures would contribute to the development of economically weaker nations.[253] The impetus toward cultural imperialism, which substantially influenced the Ordinance,[254] has been identified by some as a force in the modern free trade context as well, especially with regard to efforts in favor of conditioning access to U.S. markets on compliance with American environmental and human rights standards.[255] The drive to open foreign markets has also been accompanied by a new trend toward commercialism, as the federal government has become publicly engaged in procuring international business for private American companies.[256]

Finally, including the Ordinance and its principles in our constitutional tradition could bear upon the applicability of the American model of constitutionalism to other contexts. Constitution making is taking place now in many parts of the world,[257] and the American constitutional tradition is an important point of reference for many involved in this process.[258] While some aspects of the Ordinance's tradition should not be taken as models—most notably its expansionism and imperialism—a fuller understanding could nonetheless usefully inform these constitutional efforts.

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250. See, e.g., 1 Ackerman, supra note 89, at 40–50.

251. See William A. Orme, Jr., A Fistful of Trade: NAFTA Is Just One Facet of a Growing Economic Cohesion, Wash. Post, Nov. 14, 1993, at H1; The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas (Judith H. Bello et al. eds., 1994).

252. See supra text accompanying notes 186–192.

253. See, e.g., Robert B. Reich, Escape from the Global Sweatshop: Capitalism's Stake in Uniting the Workers of the World, Wash. Post, May 22, 1994, at C1 (free trade is a means for raising living standards worldwide); Robert J. Samuelson, Why GATT Isn't Boring, Wash. Post, Dec. 22, 1993, at A21 (farmers in America, Canada, and Australia should benefit from GATT).

254. See supra text accompanying notes 181–185.

255. See Juanita Darlin et al., Can Mexico Really Clean Up Its Act?, L.A. Times, Nov. 17, 1991, at A1; Reich, supra note 253.

256. See, e.g., John F. Burns, U.S. Ends a $4 Billion Visit to India, N.Y. Times, Jan. 18, 1995, at D3 (describing deals made during trip by Secretary of Commerce Ron Brown and American business leaders to India).

257. See, e.g., Rett P. Ludwikowski, Constitution Making in the Countries of Former Soviet Dominance: Current Development, 23 Ga. J. Int'l & Comp. L. 155, 155 (1993).

258. See, e.g., Joan Davison, America's Impact on Constitutional Change in Eastern Europe, 55 Alb. L. Rev. 793, 794 (1992).

CONCLUSION

This Note has shown that the Northwest Ordinance, because of the nature of its authority and the significance of its principles, should be included among the foundational documents of our constitutional tradition. Through the Ordinance, the Continental Congress promulgated a set of principles, effectively inscribing them upon the institutions and practices not merely of the Northwest Territory, but of the national government as well. Thus, judges and scholars must consider the implications of the Ordinance and the principles it expresses in formulating their accounts of our constitutional tradition. Doing so will improve our ability to evaluate arguments from constitutional tradition in both the political and the legal spheres.